



JUDICIAL OFFICER

2101 WILSON BOULEVARD,
SUITE 600
ARLINGTON VA 22201-3078

March 21, 2012

Jason Smathers
MuckRock News
Dept. MR 1124
P.O. Box 55189
Boston, MA 02205-5819

Dear Mr. Smathers:

This responds to your Freedom of Information Act (FOIA) requests (FOIA Case Nos. 2012-FPRO-00504 and 2012-FPRO-00507), dated February 24, 2012, requesting access to Postal Service records. Specifically, you requested copies of all the Administrative and Board decisions from September 2011 to present. Enclosed are hard copies of the requested decisions.

If you have any questions, you may contact me at 703-812-1905.

Sincerely,

A handwritten signature in cursive script, appearing to read "Diane M. Mego".

Diane M. Mego
Staff Counsel



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Diane M. Mego
Staff Counsel

In the Matter of the Petitions by

March 19, 2012

STEPHEN J. TOPEL

P.S. Docket Nos. AO 10-164 and 165

ERRATA

The attached *Initial Decision* has been reissued to reflect the correct title and to include appeal rights.

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petitions by

January 24, 2012

STEPHEN J. TOPEL

P.S. Docket Nos. AO 10-164 and 165

APPEARANCE FOR PETITIONER:
Stephen J. Topel

APPEARANCE FOR RESPONDENT:
Sherri Garner

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

On September 15, 2011, the undersigned received from Respondent's representative an *Answer* in which Respondent indicated that it would not pursue the debts that are the subject of these consolidated Debt Collection Act cases. I read Respondent's submission as an admission on the merits of the Petition.

On September 16, 2011, I issued an *Order to Show Cause* in the above consolidated Debt Collection Act cases, in which I stated my intention to issue a Decision in favor of Petitioner unless I received objection in writing from either party on or before September 30, 2011. No objection was received from either party. Accordingly, Petitioner is entitled to judgment in his favor.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petition by

February 8, 2012

MARGARET L. SMITH

P.S. Docket No. AO 11-151

APPEARANCE FOR PETITIONER:

Margaret L. Smith

APPEARANCE FOR RESPONDENT:

Tom Cloonan

INITIAL DECISION

As a result of Petitioner Margaret L. Smith's relocation to a new duty station, Respondent, United States Postal Service, paid her a temporary quarters allowance. Upon learning, two-and-one-half years later, that Petitioner had moved with her household furnishings into a house she owned at the new duty station, Respondent demanded that she repay the temporary quarters allowance. By then Petitioner had retired, and she filed a Petition for Review under 39 C.F.R. Part 966, *Rules of Practice in Proceedings Relative to Administrative Offsets Initiated Against Former Employees of the Postal Service*.

A hearing was held in San Diego, and the parties submitted documents and written argument. The following findings of fact are made based on the documents submitted and the testimony at the hearing.

FINDINGS OF FACT

1. In 2008, Petitioner was employed as an Operations Support Specialist in Respondent's Western Area Office in Denver (Petitioner's Exhibit ("Pet. Exh.") 1, p. 8).

2. She accepted a similar job in the Pacific Area Office in San Diego, a lateral transfer that included payment to Petitioner of relocation benefits pursuant to Respondent's F-15 Handbook (Pet. Exh. 4, pp. 1-4; Hearing Transcript, page ("Tr.") 171).

3. The F-15 Handbook in effect at the time of Petitioner's move was the December 22, 2000 edition, revised as of March 25, 2002, and July 1, 2005 (hereinafter referred to as the "F-15 Handbook") (Tr. 25-26).

4. On February 1, 2008, a Postal Service relocation coordinator sent Petitioner a brochure describing available relocation benefits. She advised Petitioner where the F-15 Handbook could be accessed on the internet, but noted, "HQ is in the process of revising the F-15 for relocation." The relocation brochure identified the information it provided as general information and pointed out that "Handbook F-15 provides detailed information." (F-15 Handbook; Postal Bulletin 22159 (July 21, 2005); Pet. Exh. 4, pp. 1-12).

5. The relocation benefits to be afforded Petitioner were listed on PS Form 178, *Specific Travel Order – Relocation and Relocation Agreement*, and included a temporary quarters allowance for her move from Denver to San Diego. The Form 178 identified March 31, 2008, as Petitioner's date to report to her new duty station. (Respondent's Exhibit ("Resp. Exh.") 13 (PS Form 178 (Interim), December 2000); Tr. 195).

6. The temporary quarters allowance authorized by the F-15 Handbook provided a lump sum amount to compensate a relocating employee for subsistence expenses while living in temporary quarters. These expenses

consist of commercial lodging, meals, laundry, and dry-cleaning. The policy granting the benefit recognizes that while living in temporary quarters, the employee will not have available cooking and laundry facilities and thus will incur extra costs for lodging, restaurant meals, and laundry. (F-15 Handbook, p. 25; Tr. 33, 88-89).

7. The F-15 Handbook defined temporary quarters as follows:

Definition

Temporary quarters refer to any lodging obtained from commercial sources that you and your immediate family occupy for a temporary amount of time. This is a temporary solution for housing until you can move into a permanent residence. Quarters are not considered temporary if your lease is for more than 60 days.

* * *

BE AWARE that if you move your household goods into your temporary quarters, your housing is no longer considered temporary, and your expenses will not be reimbursed.

The admonition regarding household goods was repeated a few pages later:

IMPORTANT: If, at any time, you move your household goods into the temporary quarters, the reimbursable expenses discussed previously are terminated.

(F-15 Handbook, pp. 25, 29) (emphasis in original).

8. In 2005, Respondent revised the F-15 Handbook, adopting an approach to temporary quarters awards under which Respondent calculated a lump sum figure that would be paid to the employee in advance of relocation. For an employee who owned her own home at the old duty station, the lump sum temporary quarters allowance was calculated based on 60 days of the standard rate for lodging and per diem authorized federal travelers by the General

Services Administration ("GSA") for the new duty location. (Postal Bulletin 22159 (July 21, 2005), p. 39; Tr. 27-29, 131).

9. On February 4, 2008, Petitioner signed the PS Form 178 authorizing her relocation benefits (Finding 5). The form included a Relocation Agreement in which she agreed:

1. In consideration of my receiving the benefits provided by Handbook F-15, *Travel and Relocation*, as applicable, I hereby agree to report to my newly assigned duty station and to remain in the USPS and at my newly assigned duty station for a period of twelve (12) months following the effective date of my transfer. I understand the effective date of my transfer to be the date I reported for duty at my new official station.

2. I understand and agree that if I violate this agreement, all money paid to me and to third parties by the USPS as benefits in connection with my transfer shall be recoverable from me as a debt due to the USPS.

* * *

4. I have read the appropriate sections of Handbook F-15, as applicable, relating to relocation benefits.

(Resp. Exh. 13).

10. The F-15 Handbook cautioned an employee receiving relocation benefits, "If you decline to accept or complete your relocation, or you do not complete the 12-month commitment, you must pay back all relocation expenses that the Postal Service incurred for your relocation benefits . . ." (F-15 Handbook, p. 9).

11. Relocating employees were required by the F-15 Handbook to "[a]void unnecessary expenses." (F-15 Handbook, p. 5).

12. Petitioner received a \$15,210 lump sum payment consisting of \$2,272 for a house hunting trip and \$12,938 for the temporary quarters allowance. The

temporary quarters allowance was calculated by multiplying the sum of the standard GSA lodging and meal rates for travelers in San Diego (\$146 per day and \$64 per day, respectively) by 60 days ($60 \times \$210 = \$12,600$) and adding the cost of one round trip airfare between Denver and San Diego (\$338). (Resp. Exhs. 3, 24; Tr. 135-136).

13. Respondent contracts with a relocation company, Cartus, to coordinate employee relocations. On February 14, 2008, a Cartus representative advised Petitioner of the relocation benefits available to her, including the compensation for house hunting trips and temporary quarters. She wrote regarding the lump sum temporary quarters allowance, "There are no receipts required and the money is to be used at your discretion." She also advised that Petitioner had two years from her report-to-work date to complete her relocation. (Pet. Exh. 3, p. 11; Resp. Exh. 10).

14. Cartus representatives coordinate employee relocations and administer available relocation benefits but have no authority to approve, change, or allow relocation benefits not authorized by Respondent (Tr. 52-54, 108-109).

15. Petitioner has owned a house in San Diego since 1998. At least part of the house had been rented to a tenant up to 2007; thereafter it was occupied periodically by her son, who paid no rent. Petitioner paid the mortgage and all other costs of the house while she was in Denver. (Resp. Exhs. 1 (pp. 5, 8), 3, 5; Tr. 179, 181, 217-218).

16. In processing Petitioner's move, neither Respondent's employees nor the Cartus representative told Petitioner that moving into her own house in San

Diego would disqualify her from receiving a temporary quarters allowance. The Cartus representative did not ask Petitioner if she owned a house in San Diego. The F-15 Handbook did not specifically point out that moving into a house owned by the employee at the new duty station would bar receipt of a temporary quarters allowance nor did the relocation brochure Petitioner was provided (Finding 4). (F-15 Handbook; Tr. 51-52, 83, 102, 187-190).¹ None of the relocation forms given Petitioner to complete required that she notify Respondent that she owned a home at the new duty station (Tr. 58, 79).

17. Cartus coordinated the move of Petitioner's household furnishings from Denver to San Diego. At Petitioner's direction, her household goods were delivered to her San Diego house on March 28, 2008, the same day she moved in. (Resp. Exhs. 1 (pp. 27-34), 3, 17; Tr. 37).

18. Petitioner lived in the house for about a month. She then moved into a townhouse in San Diego that she had previously rented for her son (Tr. 180, 189, 216-217). She moved back to her house in October 2008. From December 2008 until July 2010, she rented part of the house to a tenant (Tr. 180), but thereafter, Petitioner was the sole occupant. (Resp. Exh. 1 (pp. 11-12), 3, 7; Tr. 179).

19. Petitioner reported to her new job at the Pacific Area Office in San Diego on March 31, 2008 (Pet. Exh. 3, p. 9; Resp. Exhs. 3, 7).

¹ A subsequent revision of Respondent's relocation regulation provided, "If you own or lease a home in the new duty station that will become your principal residence, relocation benefits will be limited." (F-15-A Handbook, *Relocation Policy – Nonbargaining Executive and Administrative Schedule (EAS) Employees*, August 2010, Section 247; see Pet. Exh. 6).

20. The Postal Service bought Petitioner's Denver home no later than May 6, 2008. Up until that time Petitioner paid all expenses of owning her Denver house. (Resp. Exh. 14; Tr. 50-52, 64).

21. During the period from her 2008 relocation to San Diego through 2010, Petitioner tried to buy at least two houses in San Diego and three houses near where her son then lived, about a 60-mile commute from her office. (Pet. Exhs. 1 (p. 16), 3 (pp. 17-18, 44-46); Resp. Exhs. 5, 6; Tr. 221).²

22. Near the end of the two-year relocation period, Petitioner requested a one-year extension to use a relocation benefit that would cover closing costs of her acquisition of a permanent residence at her new duty station. On April 13, 2010, the Headquarters relocation office granted a six-month extension, to September 30, 2010. (Resp. Exh. 6; Pet. Exhs. 1 (pp. 16-20), 3 (pp. 17-23); Tr. 72-73).

23. When considering Petitioner's extension request, a postal financial systems analyst in San Diego asked Petitioner whether she owned a home in San Diego. Petitioner told her she did but that it was a rental. (Tr. 151-152). Had she known Petitioner had lived in her own house since her relocation in 2008, the analyst would not have recommended approval of the extension request (Tr. 152-154). Respondent's Headquarters relocation official granting the extension did not know Petitioner had moved back into a house she owned when relocating in 2008. If she had known, she would not have granted the extension. (Tr. 74, 93-94).

² In an August 27, 2009 email regarding her search for a house, Petitioner wrote to a friend, "I have no problem rehabbing if the payback is worth it. Depending on the property, I would live in it (rent out my place), rent it or resell" (Resp. Exh. 19 (p. 3); Tr. 212).

24. On July 7, 2010, Petitioner asked her Cartus representative whether she would still receive the new home purchase benefits if she retired before closing the purchase of a new home but still closed before September 30, 2010. The representative advised her that once she retired, no further relocation benefits would be paid. (Pet. Exh. 4, p. 13).

25. On August 30, 2010, Petitioner bought a house in San Clemente, California, near her son's home and the location where she wished to live after she retired from the Postal Service (Pet. Exh. 3, p. 23).

26. On September 2, 2010, Petitioner filed a claim with Respondent for recovery of her closing costs of \$9,629.15 for the San Clemente house (Pet. Exh. 1, pp. 28-33; Resp. Exh. 1, p. 7).

27. Petitioner retired from the Postal Service effective September 30, 2010 (Resp. Exhs. 4, 20). She lived in her San Diego house until she moved to San Clemente (Tr. 219).

28. On October 1, 2010, Petitioner's former manager denied Petitioner's claim for closing costs, stating that they were not recoverable because they were for a second home. He added that the \$12,938 temporary quarters portion of the lump sum paid Petitioner must be repaid: "As you relocated to your new duty station to a home you owned, which was and continued to be your principal residence, you were not eligible for the temporary quarters allowance." He followed that letter with a Letter of Debt Determination on October 4, repeating the demand that Petitioner repay \$12,938 and offering Petitioner an opportunity

to request reconsideration. (Pet. Exhs. 1 (p. 37), 3 (pp. 28-29); Resp. Exh. 12; Tr. 162-163).

29. On October 7, 2010, Petitioner requested reconsideration, arguing that she never intended for her San Diego house to be her permanent or principal residence, and that the San Clemente house is her permanent residence (Pet. Exh. 1 (p. 41), 3 (p. 32)).

30. On March 4, 2011, Petitioner wrote to her former manager complaining that she was entitled to a pay-for-performance bonus earned before her retirement (Pet. Exhs. 1 (p. 43), 3 (p. 34); Tr. 167, 184). An award was made, but Respondent withheld the full amount to apply to repayment of the temporary quarters allowance Petitioner received in 2008 (Pet. Exhs. 1 (p. 44), 3 (p. 35); Resp. Exhs. 21, 22; Tr. 137).

31. On April 20, 2011, Petitioner's former manager denied reconsideration of the debt. He concluded that Petitioner was not entitled to a temporary quarters allowance under Postal Service regulations because she moved into a house she owned at her new duty station. He noted that her \$4,323 pay-for-performance award would be credited toward the debt, and he demanded that she pay the remaining \$8,615 balance within 14 days. He advised that if she failed to do so, "we will take the necessary steps to collect this amount involuntarily." He concluded the letter by advising Petitioner of her right to file a petition under 39 C.F.R. Part 966. (Resp. Exh. 11; Pet. Exhs. 1 (p. 52), 3 (p. 43)).

32. Respondent withheld the net amount of Petitioner's pay-for-performance award, \$3,179.57, and applied it to the claimed debt (Resp. Exh. 22).

33. Respondent requested the Office of Personnel Management ("OPM") to collect from Petitioner's annuity to satisfy her debt to Respondent (Resp. Exh. 20).

34. The amount of \$1,969.19 was withheld from Petitioner's May 1, 2011 annuity payment (Pet. Exh. 2, pp. 28-29; Resp. Exhs. 21, 22; Annuity Statements submitted with Petitioner's Brief ("Annuity Statements")).

35. Petitioner's timely Petition for Review Under 39 C.F.R. Part 966 was docketed May 9, 2011. The Notice of Docketing required Respondent to stay collection action in accordance with the applicable rules of practice (39 C.F.R. §966.5).

36. The amount of \$1,969.19 was withheld from Petitioner's June 1, 2011 annuity payment (Resp. Exhs. 21, 22; Annuity Statements).

37. By Order dated June 3, 2011, I directed Respondent to refund any withholdings made after Petitioner filed her Petition.

38. On June 17, 2011, Respondent reimbursed Petitioner \$1,969.19 (Resp. Exh. 21; Declaration of M. Petrachek, Exhibits A – D).

39. The amount of \$1,969.19 was withheld from Petitioner's July 1, 2011 annuity payment (Annuity Statements).

40. Petitioner's September 1, 2011 annuity payment included a reimbursement from OPM of \$1,969.19 (Annuity Statements).

41. The total amount claimed by Respondent is \$12,938. It has collected a total of \$5,148.76 (\$3,179.57, the net of Petitioner's pay-for-performance award (Finding 32), plus \$1,969.19 collected from Petitioner's May 1, 2011 annuity payment (Finding 34)).³ In this proceeding Petitioner challenges Respondent's retention of the amounts withheld and its intention to collect the remainder, \$7,789.24, from her future annuity payments.

DECISION

Scope of Decision

Petitioner challenged Respondent's refusal to pay her closing costs for the August 2010 purchase of her home in San Clemente (Findings 25, 26, 28) as well as Respondent's intended involuntary collection of the \$12,938 temporary quarters allowance. Respondent's Answer addressed both issues. In a July 13, 2011 telephone conference (confirmed by a July 14, 2011 *Order and Memorandum of Telephone Conference*), I advised the parties that 39 C.F.R. Part 966 authorized consideration only of the second issue. I have no authority to consider Respondent's refusal to pay Petitioner's closing costs. Accordingly, this Initial Decision will decide only Petitioner's challenge to Respondent's recovery of the temporary quarters allowance.

Positions of the Parties

Respondent argues that it is entitled to recover the lump sum temporary quarters allowance Petitioner received because its relocation regulations do not authorize a temporary quarters allowance under the circumstances of Petitioner's

³ The annuity withholdings made on June 1 and July 1, 2011, have been reimbursed to Petitioner (Findings 36, 38, 39, 40).

relocation. It argues that as the payment was made to Petitioner erroneously, Respondent is entitled to recover it.

Petitioner argues she should not be denied the temporary quarters allowance because (1) the F-15 Handbook does not explicitly state that she was not entitled to the benefit and Respondent's officials' understood she was entitled to receive it; (2) Respondent's representatives waived recovery by leading her to believe she was entitled to the benefit by granting it in the first place and by subsequently extending the time for her to claim the home purchase benefit; (3) Respondent unfairly delayed collection for two-and-one-half years; (4) Respondent failed to advise her of her appeal rights; (5) the F-15 Handbook does not authorize requiring her to pay back the allowance under circumstances present here; and (6) it was always her intention that her San Diego house would only be her temporary residence.

The F-15 Handbook

The F-15 Handbook defines temporary quarters as lodging obtained "from commercial sources." (Finding 7). Upon returning to San Diego, Petitioner moved into the house she owned there (Finding 17), not to lodging obtained from commercial sources. Additionally, because she received her household goods at the same time she moved into the San Diego house (Finding 17), a few days before reporting to her new job (Finding 19), she did not suffer the inconveniences of temporary lodging that the temporary quarters allowance is intended to alleviate, i.e., lack of permanent lodging with laundry facilities and a kitchen to prepare meals (Finding 6). Moreover, under explicit limitations given

emphasis in the F-15 Handbook, moving her household goods into her San Diego house disqualified Petitioner from receiving a temporary quarters allowance (Finding 7).⁴ Additionally, as she had her household goods, her relocation experience does not justify recovery of a benefit designed to defray subsistence expenses stemming from temporary quarters occupancy (Finding 6).⁵ Consequently, she was not entitled to a temporary quarters allowance under the F-15 Handbook.

Petitioner argues that she was not aware of the consequence of moving her household furnishings into her San Diego house. She blames this on Respondent because (1) neither postal employees nor the Cartus representative involved with her relocation told her (Finding 16); (2) none of the forms she was required to complete asked whether she was moving into a house she owned (Finding 16); (3) the relocation brochure she was provided did not alert her to that limitation (Finding 16); and (4) she was notified that the F-15 Handbook was under revision (Finding 4) and assumed it no longer applied.

Whether the F-15 Handbook was being revised has no bearing on its applicability at the time of her relocation. Further, the postal employee who

⁴ Petitioner argued that the inclusion in a later edition of Respondent's relocation regulation of a statement that moving into an owned home at the new duty station would limit relocation benefits (Finding 16, fn. 1) demonstrates that the F-15 applicable to her move did not include such a limit. However, the language of the applicable F-15 Handbook addresses Petitioner's exact circumstance and bars her recovery of a temporary quarters allowance because she at all times had her household furnishings available to her. (Finding 6). That a later statement of the relocation policy might have focused more directly on ownership of the home does not change the limitations of the applicable F-15 Handbook.

⁵ Petitioner argues that she was entitled to a temporary quarters allowance at least until May 6, 2008, when Respondent bought her Denver home (Finding 20), because she was bearing the expenses of two households. However, incurring overlapping costs of home ownership does not entitle her to a temporary quarters allowance. Moreover, she was incurring the same double housing costs before she moved.

advised Petitioner that the F-15 Handbook was under revision also told her where to find the F-15 Handbook on the internet, and the relocation brochure she was given specifically directed Petitioner to the F-15 Handbook for detailed information concerning relocation benefits and limitations (Finding 4). During the relocation process, Petitioner repeatedly was directed to the F-15 handbook for guidance, and on the Form 178 authorizing her relocation, Petitioner certified that she had read the appropriate sections of the F-15 Handbook (Finding 9). The F-15 Handbook was a regulation of the Postal Service (39 C.F.R. §211.2 (a)(3)) and defined the scope of relocation benefits afforded its employees. That no one specifically and personally warned Petitioner of the consequence of moving with her household furnishings into a house she owned does not relieve her of limitations imposed by Respondent's regulation. See *United States v. Bar Bea Trucking Co.*, 713 F.2d 1563, 1567 (Fed. Cir. 1983).⁶

Petitioner argues that the actions of Respondent's officials in allowing her to keep the money for two-and-one-half years before attempting recovery, authorizing the temporary quarters benefit in the first place, and granting Petitioner an extension to the two-year period to use the home purchase benefit waived the limitations of the F-15 Handbook. Respondent has demonstrated that Petitioner was not entitled to a temporary quarters allowance. Thus, granting the benefit in the first place was erroneous, and Petitioner is not entitled to keep a

⁶ Petitioner argues that the Cartus representative's statement that the lump sum was to be used at Petitioner's discretion (Finding 13) authorized her receipt and use of the temporary quarters allowance. That statement only identified the lump sum nature of the temporary quarters allowance and did not signify that Petitioner had discretion to keep a lump sum benefit to which she was not entitled. The Cartus representative had no authority to grant a benefit Petitioner did not qualify for under the F-15 Handbook (Finding 14).

benefit granted her in error. See *Jill Jacquin*, P.S. Docket No. DCA 96-371 (January 24, 1997). While a prompt recovery of the unauthorized benefit would have been preferable, there is no statute of limitations that would preclude Respondent from recovery at this time, *Kathryn L. Schrack*, P.S. Docket Nos. DCA 11-52, DCA 11-53, and DCA 11-54 (August 26, 2011), and Petitioner has not demonstrated prejudice stemming from the collection delay.

Moreover, Petitioner led the postal officials granting the extension to believe that her San Diego house was a rental. Had they known that Petitioner had moved into her own home and moved her furnishings in, Petitioner would not have been granted the extension. (Findings 22, 23). Under these circumstances extending the time for use of the home purchase benefit does not demonstrate that Respondent's officials agreed that Petitioner's receipt of the temporary quarters allowance was appropriate.

Avoidance of Unnecessary Expenses

Petitioner argues that she saved Respondent money by moving her household furnishings into her San Diego house because she would have been entitled to store them at Respondent's expense. She suggests that she was thus in compliance with the requirement in the F-15 Handbook that she avoid unnecessary expenses (Finding 11). The purpose of the temporary quarters allowance is to defray lodging, meal, and incidental expenses associated with being in temporary housing. That under different facts Respondent's cost of Petitioner's relocation might have been less is irrelevant.

Respondent's Right to Recover the Temporary Quarters Allowance

Petitioner argues that the F-15 Handbook and her Relocation Agreement allow Respondent to recover the benefit in only two situations: (1) if she failed to relocate or (2) if she failed to stay in the new position for 12 months (Findings 9, 10). Since she met both of those requirements, she contends there is no basis for requiring her to repay the temporary quarters allowance she received.

Specific reference to two situations in which the employee may be required to repay relocation benefits does not preclude Respondent's recovery where, as here, Petitioner was not entitled to the temporary quarters allowance under Postal Service regulations. As the benefit was paid to her erroneously, she acquired no right to keep the funds. See *DiSilvestro v. United States*, 405 F.2d 150, 155 (2d Cir. 1968). Accordingly, Petitioner is indebted to Respondent in the amount of the erroneously paid relocation benefit. See *Raymond J. Voisine*, P.S. Docket No. DCA 95-22 (March 21, 1995).

Respondent's Withholding of Funds Owed Petitioner

Petitioner complains that Respondent failed to advise her of her right to petition for a hearing under 39 C.F.R. Part 966, *Rules of Practice in Proceedings Relative to Administrative Offsets Initiated against Former Employees of the Postal Service*, before withholding her pay-for-performance bonus and deducting from her May 1, 2011 annuity payment (Findings 31-40). Respondent's administrative offset regulations contemplate that an action to collect for a debt attributed to a former employee will be initiated by a demand from the Eagan Accounting Service Center offering an opportunity for the former employee to obtain reconsideration by her former installation head. 39 C.F.R. §966.4. In this



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ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

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Chief Administrative Law Judge

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February 8, 2012

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P.S. Docket No. AO 11-151

APPEARANCE FOR PETITIONER:
Margaret L. Smith

APPEARANCE FOR RESPONDENT:
Tom Cloonan

INITIAL DECISION

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FINDINGS OF FACT

1. In 2008, Petitioner was employed as an Operations Support Specialist in Respondent's Western Area Office in Denver (Petitioner's Exhibit ("Pet. Exh.") 1, p. 8).

2. She accepted a similar job in the Pacific Area Office in San Diego, a lateral transfer that included payment to Petitioner of relocation benefits pursuant to Respondent's F-15 Handbook (Pet. Exh. 4, pp. 1-4; Hearing Transcript, page ("Tr.") 171).

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7. The F-15 Handbook defined temporary quarters as follows:

Definition

Temporary quarters refer to any lodging obtained from commercial sources that you and your immediate family occupy for a temporary amount of time. This is a temporary solution for housing until you can move into a permanent residence. Quarters are not considered temporary if your lease is for more than 60 days.

* * *

BE AWARE that if you move your household goods into your temporary quarters, your housing is no longer considered temporary, and your expenses will not be reimbursed.

The admonition regarding household goods was repeated a few pages later:

IMPORTANT: If, at any time, you move your household goods into the temporary quarters, the reimbursable expenses discussed previously are terminated.

(F-15 Handbook, pp. 25, 29) (emphasis in original).

8. In 2005, Respondent revised the F-15 Handbook, adopting an approach to temporary quarters awards under which Respondent calculated a lump sum figure that would be paid to the employee in advance of relocation. For an employee who owned her own home at the old duty station, the lump sum temporary quarters allowance was calculated based on 60 days of the standard rate for lodging and per diem authorized federal travelers by the General

Services Administration ("GSA") for the new duty location. (Postal Bulletin 22159 (July 21, 2005), p. 39; Tr. 27-29, 131).

9. On February 4, 2008, Petitioner signed the PS Form 178 authorizing her relocation benefits (Finding 5). The form included a Relocation Agreement in which she agreed:

1. In consideration of my receiving the benefits provided by Handbook F-15, *Travel and Relocation*, as applicable, I hereby agree to report to my newly assigned duty station and to remain in the USPS and at my newly assigned duty station for a period of twelve (12) months following the effective date of my transfer. I understand the effective date of my transfer to be the date I reported for duty at my new official station.

2. I understand and agree that if I violate this agreement, all money paid to me and to third parties by the USPS as benefits in connection with my transfer shall be recoverable from me as a debt due to the USPS.

* * *

4. I have read the appropriate sections of Handbook F-15, as applicable, relating to relocation benefits.

(Resp. Exh. 13).

10. The F-15 Handbook cautioned an employee receiving relocation benefits, "If you decline to accept or complete your relocation, or you do not complete the 12-month commitment, you must pay back all relocation expenses that the Postal Service incurred for your relocation benefits . . ." (F-15 Handbook, p. 9).

11. Relocating employees were required by the F-15 Handbook to "[a]void unnecessary expenses." (F-15 Handbook, p. 5).

12. Petitioner received a \$15,210 lump sum payment consisting of \$2,272 for a house hunting trip and \$12,938 for the temporary quarters allowance. The

temporary quarters allowance was calculated by multiplying the sum of the standard GSA lodging and meal rates for travelers in San Diego (\$146 per day and \$64 per day, respectively) by 60 days (60 x \$210 = \$12,600) and adding the cost of one round trip airfare between Denver and San Diego (\$338). (Resp. Exhs. 3, 24; Tr. 135-136).

13. Respondent contracts with a relocation company, Cartus, to coordinate employee relocations. On February 14, 2008, a Cartus representative advised Petitioner of the relocation benefits available to her, including the compensation for house hunting trips and temporary quarters. She wrote regarding the lump sum temporary quarters allowance, "There are no receipts required and the money is to be used at your discretion." She also advised that Petitioner had two years from her report-to-work date to complete her relocation. (Pet. Exh. 3, p. 11; Resp. Exh. 10).

14. Cartus representatives coordinate employee relocations and administer available relocation benefits but have no authority to approve, change, or allow relocation benefits not authorized by Respondent (Tr. 52-54, 108-109).

15. Petitioner has owned a house in San Diego since 1998. At least part of the house had been rented to a tenant up to 2007; thereafter it was occupied periodically by her son, who paid no rent. Petitioner paid the mortgage and all other costs of the house while she was in Denver. (Resp. Exhs. 1 (pp. 5, 8), 3, 5; Tr. 179, 181, 217-218).

16. In processing Petitioner's move, neither Respondent's employees nor the Cartus representative told Petitioner that moving into her own house in San

Diego would disqualify her from receiving a temporary quarters allowance. The Cartus representative did not ask Petitioner if she owned a house in San Diego. The F-15 Handbook did not specifically point out that moving into a house owned by the employee at the new duty station would bar receipt of a temporary quarters allowance nor did the relocation brochure Petitioner was provided (Finding 4). (F-15 Handbook; Tr. 51-52, 83, 102, 187-190).¹ None of the relocation forms given Petitioner to complete required that she notify Respondent that she owned a home at the new duty station (Tr. 58, 79).

17. Cartus coordinated the move of Petitioner's household furnishings from Denver to San Diego. At Petitioner's direction, her household goods were delivered to her San Diego house on March 28, 2008, the same day she moved in. (Resp. Exhs. 1 (pp. 27-34), 3, 17; Tr. 37).

18. Petitioner lived in the house for about a month. She then moved into a townhouse in San Diego that she had previously rented for her son (Tr. 180, 189, 216-217). She moved back to her house in October 2008. From December 2008 until July 2010, she rented part of the house to a tenant (Tr. 180), but thereafter, Petitioner was the sole occupant. (Resp. Exh. 1 (pp. 11-12), 3, 7; Tr. 179).

19. Petitioner reported to her new job at the Pacific Area Office in San Diego on March 31, 2008 (Pet. Exh. 3, p. 9; Resp. Exhs. 3, 7).

¹ A subsequent revision of Respondent's relocation regulation provided, "If you own or lease a home in the new duty station that will become your principal residence, relocation benefits will be limited." (F-15-A Handbook, *Relocation Policy – Nonbargaining Executive and Administrative Schedule (EAS) Employees*, August 2010, Section 247; see Pet. Exh. 6).

20. The Postal Service bought Petitioner's Denver home no later than May 6, 2008. Up until that time Petitioner paid all expenses of owning her Denver house. (Resp. Exh. 14; Tr. 50-52, 64).

21. During the period from her 2008 relocation to San Diego through 2010, Petitioner tried to buy at least two houses in San Diego and three houses near where her son then lived, about a 60-mile commute from her office. (Pet. Exhs. 1 (p. 16), 3 (pp. 17-18, 44-46); Resp. Exhs. 5, 6; Tr. 221).²

22. Near the end of the two-year relocation period, Petitioner requested a one-year extension to use a relocation benefit that would cover closing costs of her acquisition of a permanent residence at her new duty station. On April 13, 2010, the Headquarters relocation office granted a six-month extension, to September 30, 2010. (Resp. Exh. 6; Pet. Exhs. 1 (pp. 16-20), 3 (pp. 17-23); Tr. 72-73).

23. When considering Petitioner's extension request, a postal financial systems analyst in San Diego asked Petitioner whether she owned a home in San Diego. Petitioner told her she did but that it was a rental. (Tr. 151-152). Had she known Petitioner had lived in her own house since her relocation in 2008, the analyst would not have recommended approval of the extension request (Tr. 152-154). Respondent's Headquarters relocation official granting the extension did not know Petitioner had moved back into a house she owned when relocating in 2008. If she had known, she would not have granted the extension. (Tr. 74, 93-94).

² In an August 27, 2009 email regarding her search for a house, Petitioner wrote to a friend, "I have no problem rehabbing if the payback is worth it. Depending on the property, I would live in it (rent out my place), rent it or resell . . ." (Resp. Exh. 19 (p. 3); Tr. 212).

24. On July 7, 2010, Petitioner asked her Cartus representative whether she would still receive the new home purchase benefits if she retired before closing the purchase of a new home but still closed before September 30, 2010. The representative advised her that once she retired, no further relocation benefits would be paid. (Pet. Exh. 4, p. 13).

25. On August 30, 2010, Petitioner bought a house in San Clemente, California, near her son's home and the location where she wished to live after she retired from the Postal Service (Pet. Exh. 3, p. 23).

26. On September 2, 2010, Petitioner filed a claim with Respondent for recovery of her closing costs of \$9,629.15 for the San Clemente house (Pet. Exh. 1, pp. 28-33; Resp. Exh. 1, p. 7).

27. Petitioner retired from the Postal Service effective September 30, 2010 (Resp. Exhs. 4, 20). She lived in her San Diego house until she moved to San Clemente (Tr. 219).

28. On October 1, 2010, Petitioner's former manager denied Petitioner's claim for closing costs, stating that they were not recoverable because they were for a second home. He added that the \$12,938 temporary quarters portion of the lump sum paid Petitioner must be repaid: "As you relocated to your new duty station to a home you owned, which was and continued to be your principal residence, you were not eligible for the temporary quarters allowance." He followed that letter with a Letter of Debt Determination on October 4, repeating the demand that Petitioner repay \$12,938 and offering Petitioner an opportunity

to request reconsideration. (Pet. Exhs. 1 (p. 37), 3 (pp. 28-29); Resp. Exh. 12; Tr. 162-163).

29. On October 7, 2010, Petitioner requested reconsideration, arguing that she never intended for her San Diego house to be her permanent or principal residence, and that the San Clemente house is her permanent residence (Pet. Exh. 1 (p. 41), 3 (p. 32)).

30. On March 4, 2011, Petitioner wrote to her former manager complaining that she was entitled to a pay-for-performance bonus earned before her retirement (Pet. Exhs. 1 (p. 43), 3 (p. 34); Tr. 167, 184). An award was made, but Respondent withheld the full amount to apply to repayment of the temporary quarters allowance Petitioner received in 2008 (Pet. Exhs. 1 (p. 44), 3 (p. 35); Resp. Exhs. 21, 22; Tr. 137).

31. On April 20, 2011, Petitioner's former manager denied reconsideration of the debt. He concluded that Petitioner was not entitled to a temporary quarters allowance under Postal Service regulations because she moved into a house she owned at her new duty station. He noted that her \$4,323 pay-for-performance award would be credited toward the debt, and he demanded that she pay the remaining \$8,615 balance within 14 days. He advised that if she failed to do so, "we will take the necessary steps to collect this amount involuntarily." He concluded the letter by advising Petitioner of her right to file a petition under 39 C.F.R. Part 966. (Resp. Exh. 11; Pet. Exhs. 1 (p. 52), 3 (p. 43)).

32. Respondent withheld the net amount of Petitioner's pay-for-performance award, \$3,179.57, and applied it to the claimed debt (Resp. Exh. 22).

33. Respondent requested the Office of Personnel Management ("OPM") to collect from Petitioner's annuity to satisfy her debt to Respondent (Resp. Exh. 20).

34. The amount of \$1,969.19 was withheld from Petitioner's May 1, 2011 annuity payment (Pet. Exh. 2, pp. 28-29; Resp. Exhs. 21, 22; Annuity Statements submitted with Petitioner's Brief ("Annuity Statements")).

35. Petitioner's timely Petition for Review Under 39 C.F.R. Part 966 was docketed May 9, 2011. The Notice of Docketing required Respondent to stay collection action in accordance with the applicable rules of practice (39 C.F.R. §966.5).

36. The amount of \$1,969.19 was withheld from Petitioner's June 1, 2011 annuity payment (Resp. Exhs. 21, 22; Annuity Statements).

37. By Order dated June 3, 2011, I directed Respondent to refund any withholdings made after Petitioner filed her Petition.

38. On June 17, 2011, Respondent reimbursed Petitioner \$1,969.19 (Resp. Exh. 21; Declaration of M. Petrachek, Exhibits A – D).

39. The amount of \$1,969.19 was withheld from Petitioner's July 1, 2011 annuity payment (Annuity Statements).

40. Petitioner's September 1, 2011 annuity payment included a reimbursement from OPM of \$1,969.19 (Annuity Statements).

41. The total amount claimed by Respondent is \$12,938. It has collected a total of \$5,148.76 (\$3,179.57, the net of Petitioner's pay-for-performance award (Finding 32), plus \$1,969.19 collected from Petitioner's May 1, 2011 annuity payment (Finding 34)).³ In this proceeding Petitioner challenges Respondent's retention of the amounts withheld and its intention to collect the remainder, \$7,789.24, from her future annuity payments.

DECISION

Scope of Decision

Petitioner challenged Respondent's refusal to pay her closing costs for the August 2010 purchase of her home in San Clemente (Findings 25, 26, 28) as well as Respondent's intended involuntary collection of the \$12,938 temporary quarters allowance. Respondent's Answer addressed both issues. In a July 13, 2011 telephone conference (confirmed by a July 14, 2011 *Order and Memorandum of Telephone Conference*), I advised the parties that 39 C.F.R. Part 966 authorized consideration only of the second issue. I have no authority to consider Respondent's refusal to pay Petitioner's closing costs. Accordingly, this Initial Decision will decide only Petitioner's challenge to Respondent's recovery of the temporary quarters allowance.

Positions of the Parties

Respondent argues that it is entitled to recover the lump sum temporary quarters allowance Petitioner received because its relocation regulations do not authorize a temporary quarters allowance under the circumstances of Petitioner's

³ The annuity withholdings made on June 1 and July 1, 2011, have been reimbursed to Petitioner (Findings 36, 38, 39, 40).

relocation. It argues that as the payment was made to Petitioner erroneously, Respondent is entitled to recover it.

Petitioner argues she should not be denied the temporary quarters allowance because (1) the F-15 Handbook does not explicitly state that she was not entitled to the benefit and Respondent's officials' understood she was entitled to receive it; (2) Respondent's representatives waived recovery by leading her to believe she was entitled to the benefit by granting it in the first place and by subsequently extending the time for her to claim the home purchase benefit; (3) Respondent unfairly delayed collection for two-and-one-half years; (4) Respondent failed to advise her of her appeal rights; (5) the F-15 Handbook does not authorize requiring her to pay back the allowance under circumstances present here; and (6) it was always her intention that her San Diego house would only be her temporary residence.

The F-15 Handbook

The F-15 Handbook defines temporary quarters as lodging obtained "from commercial sources." (Finding 7). Upon returning to San Diego, Petitioner moved into the house she owned there (Finding 17), not to lodging obtained from commercial sources. Additionally, because she received her household goods at the same time she moved into the San Diego house (Finding 17), a few days before reporting to her new job (Finding 19), she did not suffer the inconveniences of temporary lodging that the temporary quarters allowance is intended to alleviate, i.e., lack of permanent lodging with laundry facilities and a kitchen to prepare meals (Finding 6). Moreover, under explicit limitations given

emphasis in the F-15 Handbook, moving her household goods into her San Diego house disqualified Petitioner from receiving a temporary quarters allowance (Finding 7).⁴ Additionally, as she had her household goods, her relocation experience does not justify recovery of a benefit designed to defray subsistence expenses stemming from temporary quarters occupancy (Finding 6).⁵ Consequently, she was not entitled to a temporary quarters allowance under the F-15 Handbook.

Petitioner argues that she was not aware of the consequence of moving her household furnishings into her San Diego house. She blames this on Respondent because (1) neither postal employees nor the Cartus representative involved with her relocation told her (Finding 16); (2) none of the forms she was required to complete asked whether she was moving into a house she owned (Finding 16); (3) the relocation brochure she was provided did not alert her to that limitation (Finding 16); and (4) she was notified that the F-15 Handbook was under revision (Finding 4) and assumed it no longer applied.

Whether the F-15 Handbook was being revised has no bearing on its applicability at the time of her relocation. Further, the postal employee who

⁴ Petitioner argued that the inclusion in a later edition of Respondent's relocation regulation of a statement that moving into an owned home at the new duty station would limit relocation benefits (Finding 16, fn. 1) demonstrates that the F-15 applicable to her move did not include such a limit. However, the language of the applicable F-15 Handbook addresses Petitioner's exact circumstance and bars her recovery of a temporary quarters allowance because she at all times had her household furnishings available to her. (Finding 6). That a later statement of the relocation policy might have focused more directly on ownership of the home does not change the limitations of the applicable F-15 Handbook.

⁵ Petitioner argues that she was entitled to a temporary quarters allowance at least until May 6, 2008, when Respondent bought her Denver home (Finding 20), because she was bearing the expenses of two households. However, incurring overlapping costs of home ownership does not entitle her to a temporary quarters allowance. Moreover, she was incurring the same double housing costs before she moved.

advised Petitioner that the F-15 Handbook was under revision also told her where to find the F-15 Handbook on the internet, and the relocation brochure she was given specifically directed Petitioner to the F-15 Handbook for detailed information concerning relocation benefits and limitations (Finding 4). During the relocation process, Petitioner repeatedly was directed to the F-15 handbook for guidance, and on the Form 178 authorizing her relocation, Petitioner certified that she had read the appropriate sections of the F-15 Handbook (Finding 9). The F-15 Handbook was a regulation of the Postal Service (39 C.F.R. §211.2 (a)(3)) and defined the scope of relocation benefits afforded its employees. That no one specifically and personally warned Petitioner of the consequence of moving with her household furnishings into a house she owned does not relieve her of limitations imposed by Respondent's regulation. *See United States v. Bar Bea Trucking Co.*, 713 F.2d 1563, 1567 (Fed. Cir. 1983).⁶

Petitioner argues that the actions of Respondent's officials in allowing her to keep the money for two-and-one-half years before attempting recovery, authorizing the temporary quarters benefit in the first place, and granting Petitioner an extension to the two-year period to use the home purchase benefit waived the limitations of the F-15 Handbook. Respondent has demonstrated that Petitioner was not entitled to a temporary quarters allowance. Thus, granting the benefit in the first place was erroneous, and Petitioner is not entitled to keep a

⁶ Petitioner argues that the Cartus representative's statement that the lump sum was to be used at Petitioner's discretion (Finding 13) authorized her receipt and use of the temporary quarters allowance. That statement only identified the lump sum nature of the temporary quarters allowance and did not signify that Petitioner had discretion to keep a lump sum benefit to which she was not entitled. The Cartus representative had no authority to grant a benefit Petitioner did not qualify for under the F-15 Handbook (Finding 14).

benefit granted her in error. See *Jill Jacquin*, P.S. Docket No. DCA 96-371 (January 24, 1997). While a prompt recovery of the unauthorized benefit would have been preferable, there is no statute of limitations that would preclude Respondent from recovery at this time, *Kathryn L. Schrack*, P.S. Docket Nos. DCA 11-52, DCA 11-53, and DCA 11-54 (August 26, 2011), and Petitioner has not demonstrated prejudice stemming from the collection delay.

Moreover, Petitioner led the postal officials granting the extension to believe that her San Diego house was a rental. Had they known that Petitioner had moved into her own home and moved her furnishings in, Petitioner would not have been granted the extension. (Findings 22, 23). Under these circumstances extending the time for use of the home purchase benefit does not demonstrate that Respondent's officials agreed that Petitioner's receipt of the temporary quarters allowance was appropriate.

Avoidance of Unnecessary Expenses

Petitioner argues that she saved Respondent money by moving her household furnishings into her San Diego house because she would have been entitled to store them at Respondent's expense. She suggests that she was thus in compliance with the requirement in the F-15 Handbook that she avoid unnecessary expenses (Finding 11). The purpose of the temporary quarters allowance is to defray lodging, meal, and incidental expenses associated with being in temporary housing. That under different facts Respondent's cost of Petitioner's relocation might have been less is irrelevant.

Respondent's Right to Recover the Temporary Quarters Allowance

Petitioner argues that the F-15 Handbook and her Relocation Agreement allow Respondent to recover the benefit in only two situations: (1) if she failed to relocate or (2) if she failed to stay in the new position for 12 months (Findings 9, 10). Since she met both of those requirements, she contends there is no basis for requiring her to repay the temporary quarters allowance she received.

Specific reference to two situations in which the employee may be required to repay relocation benefits does not preclude Respondent's recovery where, as here, Petitioner was not entitled to the temporary quarters allowance under Postal Service regulations. As the benefit was paid to her erroneously, she acquired no right to keep the funds. See *DiSilvestro v. United States*, 405 F.2d 150, 155 (2d Cir. 1968). Accordingly, Petitioner is indebted to Respondent in the amount of the erroneously paid relocation benefit. See *Raymond J. Voisine*, P.S. Docket No. DCA 95-22 (March 21, 1995).

Respondent's Withholding of Funds Owed Petitioner

Petitioner complains that Respondent failed to advise her of her right to petition for a hearing under 39 C.F.R. Part 966, *Rules of Practice in Proceedings Relative to Administrative Offsets Initiated against Former Employees of the Postal Service*, before withholding her pay-for-performance bonus and deducting from her May 1, 2011 annuity payment (Findings 31-40). Respondent's administrative offset regulations contemplate that an action to collect for a debt attributed to a former employee will be initiated by a demand from the Eagan Accounting Service Center offering an opportunity for the former employee to obtain reconsideration by her former installation head. 39 C.F.R. §966.4. In this

1. The first part of the report is a general introduction to the subject.

2. The second part is a detailed description of the methods used in the study.

3. The third part is a discussion of the results of the study.

4. The fourth part is a conclusion and a list of references.

5. The fifth part is a list of figures and tables.

6. The sixth part is a list of appendices.

7. The seventh part is a list of footnotes.

8. The eighth part is a list of acknowledgments.

9. The ninth part is a list of abbreviations.

10. The tenth part is a list of symbols.

11. The eleventh part is a list of units.

12. The twelfth part is a list of definitions.

13. The thirteenth part is a list of equations.

14. The fourteenth part is a list of figures.

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20. The twentieth part is a list of symbols.

21. The twenty-first part is a list of units.

22. The twenty-second part is a list of definitions.

23. The twenty-third part is a list of equations.

case, the claim for reimbursement of the temporary quarters allowance was initiated by Petitioner's former manager, but it did offer her an opportunity for reconsideration (Finding 28). Petitioner requested and received reconsideration of the alleged debt; her former manager denied her claim of entitlement to the temporary quarters allowance and advised her of her right to file a petition to challenge the involuntary collection under the applicable rules of Part 966 (Finding 29, 31). Petitioner timely filed a petition for a hearing (Finding 35). Respondent initiated withholding from Petitioner's annuity in violation of 39 C.F.R. §966.5, which provides that a timely filed petition stays further collection action, but such withholdings have been refunded to Petitioner (Findings 34, 38, 39, 40).

In this proceeding, Petitioner submitted documents in support of her position, and an oral hearing was held in which she and other witnesses she requested testified. She had an opportunity to confront and cross examine Respondent's witnesses. She was provided copies of the documents Respondent relied on as a basis for the claimed debt. After being provided a copy of the transcript, both parties submitted written argument and supplementary evidence. This process provided a fair and reasonable opportunity for Petitioner to challenge the debt claimed by Respondent.

The withholdings improperly made after this matter was docketed (but now refunded) did not prejudice her ability to challenge the debt at issue and do not provide a basis for relieving her of all or part of the debt.

Other Federal Relocation Decisions

The Civilian Board of Contract Appeals ("CBCA") considers relocation issues for federal employees other than Postal Service employees, applying the Federal Travel Regulation ("FTR"). In determining whether a relocating employee occupies temporary quarters, entitling her to a temporary quarters allowance, the FTR provides:

In determining whether quarters are temporary, the agency should consider factors such as the duration of the lease, movement of household effects into the quarters, the type of quarters, the employee's expressions of intent, attempts to secure a permanent dwelling, and the length of time the employee occupies the quarters.

41 CFR 302-5.305.

Petitioner argues that she should be entitled to the temporary quarters allowance because she always intended that her San Diego house would be a temporary residence, citing a number of CBCA decisions. She points out that throughout the two-and-one-half years of her occupancy she continued to look for other houses to buy (Finding 21) as evidence that she considered the San Diego house only a temporary residence.

Respondent argues correctly that the FTR does not apply to the Postal Service, 39 U.S.C. §410, and that the F-15 Handbook governs Petitioner's relocation. Accordingly, other agency decisions addressing relocation under the FTR are not binding in this proceeding, although their reasoning may have some helpful application in resolving Postal Service relocation issues. Nevertheless, I am not persuaded that applying the FTR standards would result in a different outcome in this case.

In *Juan G. Bernal*, CBCA 1648-RELO, December 3, 2009, an employee was found not entitled to a temporary quarters allowance because he had entered a lease for one year with no provision for breaking it early, had received all of his household furnishings when he moved in, and at the time the claim was under consideration he had been in the leased house for 9 months. Here Petitioner moved into a house she owned, received all her household furnishings when she moved in, and stayed in the house for two-and-one-half years. Petitioner's simple expressions of intent to occupy the San Diego house temporarily in the face of actions to the contrary will not suffice to prove the lodging temporary. *Id.*⁷

In a decision by the General Services Administration Board of Contract Appeals, which decided relocation claim cases before the 2007 creation of the CBCA, the judge addressed a claim for the meals and incidentals portion of a temporary quarters allowance of a relocating employee who moved into a furnished home he owned at the new duty station. The judge noted that the temporary quarters allowance serves to reimburse an employee reasonably and equitably for subsistence expenses incurred when it is necessary for the employee to occupy temporary lodging and denied the claim: "Because [the employee] occupied his own residence at the new duty station immediately upon reporting for duty, and had furnishings available for his use, he was never eligible

⁷ Additionally, a comment Petitioner made in the course of looking for another house undercuts her insistence that she intended the San Diego house to be a temporary residence while she searched for another house to be her permanent residence. In an email communication with a friend regarding her search for a house in 2009, Petitioner commented, "I have no problem rehabbing if the payback is worth it. Depending on the property, I would live in it (rent out my place), rent it or resell . . ." (Finding 21, fn. 2). This suggests an investment motivation rather than an overriding interest in finding a permanent residence.

to receive [a temporary quarters allowance]." *Donald D. Fithian, Jr.*, GSBCA No. 16712-RELO, 06-1 BCA ¶ 33,204.

Petitioner's claim of entitlement to a temporary quarters allowance would likely fare no better under the FTR standard.

Conclusion

The Petition is denied. Respondent is entitled to recover the amount of the temporary quarters allowance, \$12,938. It may retain the funds previously collected (\$5,148.76 (Finding 41)) and recover the uncollected amount, \$7,789.24, by offset against moneys owed Petitioner, including her retirement annuity.

Norman D. Menegat
Administrative Judge

In the Matter of the Petition by

February 8, 2012

JACQUELYN M. DANIEL

DCA 11-342

APPEARANCE FOR PETITIONER:
Jacquelyn M. Daniel

APPEARANCE FOR RESPONDENT:
Mayon M. Sespene

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Jacquelyn Daniel, filed a Debt Collection Act Petition on December 19, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$226.14 alleging that Petitioner received a salary overpayment in the pay periods encompassing the dates between December 18, 2000, through December 31, 2000. A Notice of Involuntary Administrative Salary Offsets was issued by Respondent on December 8, 2011. The Debt Collection Act Petition was timely filed.

On January 6, 2012, Respondent filed an *Answer* to the Debt Collection Act Petition in which Respondent cited the "3 year write off rule (sic)" (Respondent's Exhibits 1 and 2). The Three Year Policy, dated April 29, 2002, states that the Accounting Service Center would no longer establish account receivables on salary overpayments "applicable to administrative errors" that occurred "three or more years prior to the time the error was corrected." Respondent's Exh. 1; *see also, Nancy Petitti*, P.S. Docket No. DCA 09-449 (April 30, 2010)("Three Year Policy" applied to outstanding salary overpayment to

relieve Petitioner of otherwise valid debt). In recognition of the Three Year Policy, Respondent stated in its *Answer* that "the agency will rescind the 'Notice of Involuntary Administrative Salary Offsets' for the invoice #701540792 in the amount of \$226.14, and absolve the claimant of the debt."

As Respondent admits applicability of the Three Year Policy to this debt, Petitioner is entitled to entry of judgment in her favor.¹

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

¹ In a telephone conference on January 30, 2012, Respondent's representative reiterated the position of the Postal Service that the debt at issue will not be collected under the Three Year Policy.

In the Matter of the Petition by

February 15, 2012

TIMOTHY L. HUDSON

P.S. Docket No. DCA 11-204

APPEARANCE FOR PETITIONER:
Timothy L. Hudson

APPEARANCE FOR RESPONDENT:
Deborah Kelly-Brown

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Timothy L. Hudson, filed a Petition for a hearing under the Debt Collection Act of 1982 after receiving a Notice of Involuntary Administrative Salary Offsets dated June 8, 2011, from Respondent, United States Postal Service. The Notice stated Respondent's intention to withhold \$6,769.64 from Petitioner's salary to recover Petitioner's portion of Federal Employees Health Benefits (FEHB) premiums for pay periods 7/2004 through 23/2007.

FINDINGS OF FACT

1. Petitioner, an employee at Respondent's Delaware Processing and Distribution Center, was injured on the job in October 2002. After a time, the Office of Workers' Compensation Programs (OWCP) in the Department of Labor (DOL) began to pay his salary. OWCP deducted Petitioner's portion of his FEHB premiums from his salary payments.¹ (Petitioner's Supplement).

¹ At about the time Petitioner returned to work, there apparently was some question with regard to whether FEHB premiums had been withheld from the pay he received from OWCP. Some of the documents provided by Petitioner relate to this issue, but they are unrelated to the debt alleged in connection with the present case – which is for FEHB premiums for the period *after* he returned to work.

2. Petitioner returned to work and to the Postal Service payroll in March 2004 (pay period 7/2004). His FEHB enrollment was transferred from OWCP to the Postal Service at that time, and Petitioner was informed of the transfer. (Answer, Exhibit 1; Petitioner's Supplement (February 11, 2004 DOL memo – "Transfer Out of OWCP FEHB Enrollment Forms"))).

3. Respondent's usual practice is to pay the entire health insurance premium for its covered employees and then to withhold from each employee's pay the employee's portion of those premiums. Petitioner had health insurance coverage from the time he returned to work through the entire period in question.² In the absence of contrary evidence, I find that Respondent followed its usual practice in this instance and began paying the health insurance premiums for Petitioner when he returned to work. However, for reasons unexplained in the record, Respondent did not resume withholding Petitioner's portion of the premiums from his pay until pay period 24/2007. Thus, from pay period 7/2004 through pay period 23/2007, Petitioner's portion of his health insurance premiums was not withheld from his pay. (Declaration of R. Warren and attachments thereto; Answer, Exhibit 1; Petitioner's Supplement).

4. Respondent's Accounting Service Center issued Petitioner an invoice, dated December 12, 2007, indicating that Petitioner owed \$6,769.64 for the

² While Respondent's witness testified to this fact in his declaration, it was not clear from Petitioner's initial and supplemental submittals whether he was disputing that position. Therefore, during a telephone conference on December 12, 2011, I asked Petitioner whether he was contending that he did not have (or believed he did not have) health insurance coverage during the period in question. At that time, Petitioner indicated that he was unsure and, as a result, it was agreed that he would have until January 9, 2012, to indicate whether he was so contending and, if so, to support his contention. Petitioner did not file anything in response. As a result, by Order dated January 18, 2012, the parties were advised that the record was closed and that processing of this case would proceed on the assumption that Petitioner was not making this contention.

uncollected health insurance premiums (Supplement to Petition). Respondent also issued Petitioner a letter of demand, which he received on December 19, 2007 (Answer, Exhibit 4). Petitioner's union filed a grievance on his behalf, which grievance was denied at Step 1 in January 2008, and at Step 2 in April 2008 (Petitioner's Supplement ("Step 1 Grievance Outline Worksheet;" Step 2 Grievance Appeal Form; January 2, 2008 memorandum to the office of Senator Carper; April 8, 2008 letter to APWU Local Trustee)).

5. Respondent issued Petitioner a Notice of Involuntary Administrative Salary Offsets dated June 8, 2011, advising that it intended to offset the same amount (\$6,769.64) from his pay (Petitioner's Supplement). Petitioner filed a timely Petition under the Debt Collection Act.

DECISION

Regulations governing the FEHB are found in 5 C.F.R. Part 890. Under 5 C.F.R. §890.502(a)(1), an employee is deemed to incur an indebtedness to the United States in any pay period during which enrollment in the FEHB continues but a deduction for, or direct payment of, the employee's share of the premium is not made.

Respondent seeks to withhold from Petitioner's pay his portion of the FEHB premiums paid by Respondent on his behalf for pay periods 7/2004 through 23/2007. It is Respondent's initial burden to show that Petitioner was covered under the FEHB Program during that time, and that he did not pay his portion of the premiums. *Anthony Villanueva*, P.S. Docket No. DCA 10-107 (October 26, 2010); *Patricia A. McLean*, P.S. Docket No. DCA 07-31 (April 30, 2007).

As reflected in Finding 3, the record evidence demonstrates that Petitioner had FEHB coverage during the time in question, and Petitioner has not disputed that conclusion (see footnote 2). Further, Petitioner's pay records demonstrate that no health insurance premiums were withheld from his pay during that period. Accordingly, Respondent has satisfied its burden.

In defense, Petitioner's argument primarily appears to be that the Postal Service's actions in failing to withhold his premiums from his pay had the effect of allowing the debt to accumulate unfairly and that its demand for repayment is untimely. He also argues that two of his paystubs led him to believe that his debt had been satisfied.

As this office has repeatedly held, that Petitioner was apparently without fault in Respondent's failure to withhold health insurance premiums from his pay does not excuse his obligation to pay those premiums. *E.g.*, *Anthony Villanueva*, P.S. Docket No. DCA 10-107 (October 26, 2010); *Albert J. Schueren*, P.S. Docket No. DCA 03-102 (June 12, 2003); *Shon C. Hogans*, P.S. Docket No. DCA 00-17 (April 7, 2000). Petitioner's indebtedness is established by the FEHB regulation cited above. Petitioner has not alleged that he did not have FEHB coverage from pay period 7/2004 through pay period 23/2007, and has not alleged that he paid his portion of the applicable premiums. He also has not questioned Respondent's calculation of the amount due.

With regard to Petitioner's claim that his pay stubs reflect that this debt has been satisfied, he has not identified the pay stubs he is referring to. While there are numerous pay stubs in the record, none appears to support Petitioner's claim.

Accordingly, the Petition is denied. Respondent may collect \$6,769.64 from Petitioner's pay.³

David I. Brochstein
Administrative Judge

³ The parties are reminded that the "15 percent of disposable pay" rate of recovery set out in the Debt Collection Act is a maximum. The parties are free to negotiate a different rate.

In the Matter of a Mail Dispute

February 1, 2012

RONALD D. TWOHATCHET

and

BRUCE DEAN POOLAW

MD 11-264

APPEARANCE FOR DISPUTANT

Amos E. Black III, Esq.

APPEARANCE FOR DISPUTANT

C. W. Bill Morgan, Esq.

POSTAL SERVICE DECISION

On December 5, 2011, an Initial Decision was issued in which an Administrative Judge determined that mail addressed to the Kiowa Tribe of Oklahoma at P.O. Box 369, Carnegie, OK 73015-0369, should be delivered as directed by Disputant Ronald D. Twohatchet. Disputant Bruce Dean Poolaw has filed an appeal from the Initial Decision. Mr. Twohatchet opposes the appeal.

On appeal, Mr. Poolaw argues the Kiowa Hearing Board Ordinance (Ordinance), which requires all five Hearing Board members be present to determine whether sufficient evidence justifies a recall election, was erroneously relied on by the Administrative Judge. Mr. Poolaw argues that the Hearing Board Ordinance is invalid because it was not approved by the Assistant Secretary for Indian Affairs or his authorized representative as required under Section 2(g) of Article 5 of the Kiowa Constitution.¹ If the Ordinance is invalid, then the judge's

¹ Article 5, Section 2(g) of the Kiowa Constitution reads

determination that the recall election was not authorized because the Hearing Board decided the appeal of the Business Committee's decision to refer the recall proposal with less than five members present was incorrect.

The record does not support Mr. Poolaw's argument, and he has not shown that the Initial Decision is clearly erroneous or that any other grounds exist for the Judicial Officer to exercise his discretion to grant review of the Initial Decision. There is no evidence that the Kiowa Business Committee ever sought the approval of the Assistant Secretary of Indian Affairs when passing ordinances or otherwise enacting tribal law. Accordingly, the Hearing Board Ordinance is found to be binding, and the finding that the Hearing Board's decision on the recall appeal was invalid under that Ordinance was correct.²

Since the Judicial Officer has determined he will not exercise his discretion to grant review of the Initial Decision, the Initial Decision is the final agency decision as provided in 39 C.F.R. § 965.12.

The parties are reminded that this decision determines only the right to delivery of the mail in dispute not the ownership of the mail. If either party receives mail intended for the other, that party is responsible for forwarding such mail to the intended recipient.

Section 2. The Kiowa Business Committee shall be empowered to take necessary action on the following:...

(g) To promulgate and enforce ordinances and codes governing law and order to protect the peace, health, safety and general welfare, on land determined to be within tribal jurisdiction subject to the approval of the Assistant Secretary for Indian Affairs or his authorized representative.

² Mr. Poolaw also argues that the Administrative Judge misinterpreted the section of the Kiowa Constitution regarding filling vacancies on the Kiowa Business Committee. Based on the finding that the recall election was invalid, it is not necessary to address this argument.

William A. Campbell
Judicial Officer

February 1, 2012

TO THE POSTMASTER AT:

ANADARKO, OK 73005-9998

RE: The Mail Dispute Between

RONALD D. TWOHATCHET

and

BRUCE DEAN POOLAW

MD 11-264

All mail, currently being held or hereafter received, addressed to the Kiowa Tribe of Oklahoma at P.O. Box 369, Carnegie, OK 73015-0369, is to be delivered as directed by Ronald D. Twohatchet.

William A. Campbell
Judicial Officer

In the Matter of the Petition by

November 17, 2011

DEBRA ANN HAWKINS

P.S. Docket No. AO 11-243

APPEARANCE FOR DISPUTANT
DEBRA ANN HAWKINS:

APPEARANCE FOR DISPUTANT
PANDORA DAVIS:

INITIAL DECISION

On October 6, 2011, I issued an *Order to Show Cause* in this matter. In that Order I noted that although Respondent filed a *Notice of Appearance* on August 22, 2011, no *Answer* had been filed in this case. In that Order I gave Respondent until October 14, 2011, to file an *Answer* and explain the delay. A review of Postal Service records indicates that the *Order to Show Cause* was received by Respondent on October 14, 2011. Respondent did not respond to the *Order to Show Cause*, nor did Respondent request additional time to do so. Respondent is in default in this case.

Accordingly, Petitioner is entitled to judgment in her favor.

ORDER

The Petition is GRANTED. Respondent may not collect the debt of \$39,539 by administrative offset.

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petition by

March 15, 2012

DOLORES P. LOPEZ

P.S. Docket No. DCA 11-263

APPEARANCE FOR PETITIONER:

Dolores P. Lopez

T.J. Amos

APPEARANCE FOR RESPONDENT:

Sheila Shannon

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Dolores Lopez, filed a Petition for Hearing on August 31, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$435.06 based upon unpaid health benefit premiums. A hearing was conducted on December 22, 2011, in Dallas, Texas.¹ The following findings are based upon the record.

FINDINGS OF FACT

1. During pay periods 21/2007 through 05/2008, Respondent did not collect Petitioner's portion of her Federal Employee Health Benefit (FEHB) premiums by payroll deduction from her salary following Petitioner's return from a workers' compensation absence (Tr., p. 23; Respondent's Exh. 13; Petition Attachment).²

2. Respondent issued a Notice of Involuntary Administrative Salary Offsets to Petitioner on August 5, 2011 (Petition attachment).

¹ The undersigned Administrative Law Judge presided via speaker telephone from the Judicial Officer Courtroom in Arlington, Virginia.

² Citations to exhibits admitted into the record are abbreviated to "Respondent's Exh." or "Petitioner's Exh." Citations to the Transcript are abbreviated to "Tr., p_."

3. The Debt Collection Act Petition was timely filed.

DECISION

This Petition asks me to decide whether Petitioner is responsible for payment of her portion of FEHB premiums that Respondent contends it paid on behalf of Petitioner after she returned from a workers' compensation absence in 2007. Regulations governing FEHB are found in 5 C.F.R. Part 890. Part of the cost of an employee's health insurance is paid by the employing agency and the remainder of the premium is paid by the employee through payroll deductions each pay period. An employee is deemed to incur indebtedness to the United States in any pay period during which enrollment in the FEHB continues but a deduction for, or direct payment of, the employee's share of the premium is not made. 5 C.F.R. §890.501 and §890.502.

Under the Debt Collection Act, the initial burden lies with Respondent to establish that a debt exists for which Petitioner is liable. *Victoria Bingham*, P.S. Docket No. DCA 09-177 (December 7, 2009). In a case involving FEHB premiums, Respondent must at least establish that Petitioner was enrolled in FEHB during the period in which it seeks the overdue premiums. *Michelle Campbell*, P.S. Docket Nos. DCA 07-219 and 07-210 (June 3, 2008)(facts to support proof of FEHB coverage include enrollment in FEHB and payments of insurance premium); *Marcus Carter*, P.S. Docket No. DCA 08-323 (December 23, 2008)(Respondent failed to prove enrollment in FEHB during pay period); *Anthony Villanueva*, P.S. Docket No. DCA 10-107 (October 26, 2010)(Petitioner admitted enrollment in FEHB).

Although Respondent submitted a letter from the Plant Manager dated August 11, 2011, in which the Postal Service claims that it paid health benefit premiums during this period on Petitioner's behalf, no supporting evidence of this payment exists in the record (Respondent's Exh. 8). Also, Respondent did not provide any testimonial or documentary evidence to prove that Petitioner was covered by FEHB during the period in which Respondent seeks collection of the overdue premiums. Respondent offered no testimony from any witness with knowledge of Petitioner's election of FEHB. No enrollment form was offered into evidence that would tend to suggest Petitioner sought these benefits during this timeframe. For her part, Petitioner could not testify to any certainty that she or her family used insurance benefits during the period for which payment is sought, nor did she recall executing any election form for her FEHB coverage. Thus the record lacks sufficient evidence to prove that Petitioner was enrolled in FEHB during the pay periods at issue.³ Accordingly, Respondent has failed to meet its initial burden to establish that a debt exists for which Petitioner is liable.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

³ While Respondent did submit payroll records to establish that Respondent did not collect Petitioner's share of FEHB premium payments during the period in question (Finding 1), the threshold burden remains whether Respondent can prove that Petitioner was enrolled during the same time period. Payroll records reflecting nonpayment of premium by the employee do not prove that Petitioner was covered by FEHB. Likewise, the invoice issued to Petitioner does not meet that burden. In Debt Collection Act cases, we have long held that existence of an invoice creating the debt is insufficient to prove the debt. *Eugene B. Marley, Jr.*, P.S. Docket No. AO 01-35 (I.D. August 6, 2001), *finalized*, (Order September 25, 2001)(an invoice "is insufficient to establish the amount or the existence of a valid debt owed by Petitioner to the Postal Service"); *Glen Patterson*, P.S. Docket No. AO 05-62 (I.D. July 26, 2005), *aff'd*, (P.S.D. October 6, 2005)("invoices are not sufficient to prove the amount alleged"); *Victoria Bingham*, P.S. Docket No. DCA 09-177 (December 7, 2009)(existence of invoice does not prove the debt).

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petition by

March 8, 2012

MALVIN W. HARMON

P.S. Docket No. DCA 11-326

APPEARANCE FOR PETITIONER:
Harvey G. Orr

APPEARANCE FOR RESPONDENT:
Ms. Sharon Keels

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

In a telephone conference conducted on March 8, 2012, Respondent admitted that the debt of \$9,053.60 that was the subject of this Debt Collection Act Petition was the result of an administrative error and that Petitioner is not liable for the debt. *Order and Memorandum of Telephone Conference* dated March 8, 2012.

During the pendency of this matter, Respondent collected from Petitioner \$1,264.30 as an offset against this debt. Respondent shall refund the sum of \$1,264.30 to Petitioner.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary. Respondent shall refund the sum of \$1,264.30 to Petitioner within thirty (30) days of the date of this Order.

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petition by

March 6, 2012

PORTIA C. HARGROVE

P.S. Docket No. DCA 12-17

APPEARANCE FOR PETITIONER:

Portia C. Hargrove

APPEARANCE FOR RESPONDENT:

Dorothy J. Bush

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Respondent, U.S. Postal Service, issued a Notice of Involuntary Administrative Salary Offsets, dated December 27, 2011, to Petitioner, Portia C. Hargrove. Respondent's Notice determined that Petitioner owed it a \$58.85 debt and that it intended to offset that debt against Petitioner's salary.

In an undated document which was received in this office and docketed on January 9, 2012, Petitioner filed a Petition for hearing under the Debt Collection Act, contesting liability for the alleged debt. The *Notice of Docketing of Petition* required Respondent to file its answer by January 27, 2012. Respondent's representative received the *Notice of Docketing* on January 17, 2012.

Respondent did not respond.

Accordingly, on February 7, 2012, I issued an *Order to Show Cause*. That *Order* explained that Respondent had neither filed its answer nor requested an extension of time in which to do so. The Order directed Respondent to file the required answer so that I receive it no later than February 21, 2012, or show cause by that date why it is unable to do so. I specifically warned Respondent

that its failure to file its answer or show cause by that date would result in my granting this Petition without further notice.

Respondent's representative received the *Order to Show Cause* on February 10, 2012. Respondent did not respond as required, and has filed nothing in this case.

Accordingly, I find Respondent to be in default. Respondent is prohibited from collecting from Petitioner the alleged \$58.85 debt at issue by involuntary administrative salary offsets.

The Petition is GRANTED.

Gary E. Shapiro
Administrative Judge

In the Matter of the Petition by

March 7, 2012

MICHAEL W. ERVIN

P.S. Docket No. DCA 12-24

APPEARANCE FOR PETITIONER:
Charles Scialla

APPEARANCE FOR RESPONDENT:
Jesse Landy Vargas

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Michael W. Ervin filed a Petition for a hearing under the Debt Collection Act of 1982 after receiving a Notice of Involuntary Administrative Salary Offsets, dated January 8, 2012, from Respondent, United States Postal Service. In its Answer to the Petition, Respondent stated that it would withdraw its request for, and clear Petitioner's liability for, payment of \$2,880.00, which was the amount sought in the January 8, 2012 Notice.

By Order dated February 14, 2012, the parties were advised that a Final Decision would be issued in Petitioner's favor unless either party objected and showed cause why this should not be done. Neither party having objected within the time allowed, the Petition is granted. Respondent may not withhold \$2,880.00 from Petitioner's pay on an involuntary basis.

David I. Brochstein
Administrative Judge

March 14, 2012

In the Matter of a Mail Dispute Between

TERRY BLASINGAME

and

MICHELLE BLAIN

MD 12-58

APPEARANCE FOR DISPUTANT

Terry Blasingame:

APPEARANCE FOR DISPUTANT

Michelle Blain:

INITIAL DECISION

The disputants contest mail addressed to Lake Arrowhead Village Pharmacy, P.O. Box 2945, Lake Arrowhead, CA 92352-2945. Disputant Michelle Blain a/k/a Michelle Dresser a/k/a Michelle Blain Dresser, bases her claim on her ownership of the pharmacy while Disputant Terry Blasingame bases her claim on being its pharmacist-in-charge.

The Judicial Officer has directed the Lake Arrowhead Postmaster to hold the mail pending resolution of this mail dispute. I recommend that the Judicial Officer direct the postmaster to release the mail and deliver future mail addressed to Lake Arrowhead Village Pharmacy to Disputant Blain, or as she directs.

FINDINGS OF FACT

1. The Lake Arrowhead Village Pharmacy is a California corporation owned by Disputant Blain, who is also its president (February 26 and 28, 2012 Declarations of Disputant Blain; February 26, 2012 Blain Declaration attachments; Disputant Blain's Exhibits 4, 7 to submission to Postal Service Counsel).
2. While the pharmacy is located at 28200 Highway 189, Lake Arrowhead, California, it receives mail at Post Office Box 2945, Lake Arrowhead, California (Attachments to February 26, 2012 Blain Declaration; Disputant Blain's attachments to submission to Postal Service Counsel). In 2002, this post office box was opened by Ms. Blain, and she has been identified as the authorized recipient of the mail at the post office box since that time (February 26, 2012 Blain Declaration at p. 1; February 28, 2012 Blain Declaration).
3. Amidst a variety of investigations by various governmental entities regarding alleged wrongdoing associated with the pharmacy, in June 2011, Ms. Blain hired Ms. Blasingame as an employee to work as the pharmacy's pharmacist-in-charge (February 26, 2012 Blain Declaration at p. 2; Disputant Blain's Exhibits 6-7 to submission to Postal Service Counsel; Blasingame Declaration at p. 1).
4. The pharmacy's bank account identifies Ms. Blain as its owner and president, and she has been paying bills of the pharmacy from its corporate bank account (February 26, 2012 Blain Declaration Exhibit 2; Disputant Blain's Exhibit 5 to submission to Postal Service Counsel).

5. In August 2011, Ms. Blasingame entered into an agreement with Ms. Blain to purchase the pharmacy, and unidentified sales proceeds have been held in escrow (Attachment to March 6, 2012 letter from Postal Service Counsel, submitted by Disputant Blasingame). However the sale of the pharmacy has never been completed and Ms. Blain has requested that the escrow be cancelled (Blain Declaration at p. 1-2; Disputant Blain's Exhibits 3-5 to submission to Postal Service Counsel; Blasingame Declaration at p. 1).

6. In anticipation of purchasing the pharmacy, Ms. Blasingame spent considerable money paying back rent and renovating the pharmacy, and became personally responsible to ensure payments to a drug manufacturer and to the pharmacy's lessor for its lease payments (Blasingame Declaration at p. 1). Ms. Blasingame has been operating the pharmacy as pharmacist-in-charge

(Blasingame Declaration at p. 2-3)

Accordingly, the Petition is denied. Respondent may collect \$6,769.64 from Petitioner's pay.³

David I. Brochstein
Administrative Judge

³ The parties are reminded that the "15 percent of disposable pay" rate of recovery set out in the Debt Collection Act is a maximum. The parties are free to negotiate a different rate.

In the Matter of a Mail Dispute

February 1, 2012

RONALD D. TWOHATCHET

and

BRUCE DEAN POOLAW

MD 11-264

APPEARANCE FOR DISPUTANT

Amos E. Black III, Esq.

APPEARANCE FOR DISPUTANT

C. W. Bill Morgan, Esq.

POSTAL SERVICE DECISION

On December 5, 2011, an Initial Decision was issued in which an Administrative Judge determined that mail addressed to the Kiowa Tribe of Oklahoma at P.O. Box 369, Carnegie, OK 73015-0369, should be delivered as directed by Disputant Ronald D. Twohatchet. Disputant Bruce Dean Poolaw has filed an appeal from the Initial Decision. Mr. Twohatchet opposes the appeal.

On appeal, Mr. Poolaw argues the Kiowa Hearing Board Ordinance (Ordinance), which requires all five Hearing Board members be present to determine whether sufficient evidence justifies a recall election, was erroneously relied on by the Administrative Judge. Mr. Poolaw argues that the Hearing Board Ordinance is invalid because it was not approved by the Assistant Secretary for Indian Affairs or his authorized representative as required under Section 2(g) of Article 5 of the Kiowa Constitution.¹ If the Ordinance is invalid, then the judge's

¹ Article 5, Section 2(g) of the Kiowa Constitution reads

determination that the recall election was not authorized because the Hearing Board decided the appeal of the Business Committee's decision to refer the recall proposal with less than five members present was incorrect.

The record does not support Mr. Poolaw's argument, and he has not shown that the Initial Decision is clearly erroneous or that any other grounds exist for the Judicial Officer to exercise his discretion to grant review of the Initial Decision. There is no evidence that the Kiowa Business Committee ever sought the approval of the Assistant Secretary of Indian Affairs when passing ordinances or otherwise enacting tribal law. Accordingly, the Hearing Board Ordinance is found to be binding, and the finding that the Hearing Board's decision on the recall appeal was invalid under that Ordinance was correct.²

Since the Judicial Officer has determined he will not exercise his discretion to grant review of the Initial Decision, the Initial Decision is the final agency decision as provided in 39 C.F.R. § 965.12.

The parties are reminded that this decision determines only the right to delivery of the mail in dispute not the ownership of the mail. If either party receives mail intended for the other, that party is responsible for forwarding such mail to the intended recipient.

Section 2. The Kiowa Business Committee shall be empowered to take necessary action on the following:...

(g) To promulgate and enforce ordinances and codes governing law and order to protect the peace, health, safety and general welfare, on land determined to be within tribal jurisdiction subject to the approval of the Assistant Secretary for Indian Affairs or his authorized representative.

² Mr. Poolaw also argues that the Administrative Judge misinterpreted the section of the Kiowa Constitution regarding filling vacancies on the Kiowa Business Committee. Based on the finding that the recall election was invalid, it is not necessary to address this argument.

William A. Campbell
Judicial Officer

February 1, 2012

TO THE POSTMASTER AT:

ANADARKO, OK 73005-9998

RE: The Mail Dispute Between

RONALD D. TWOHATCHET

and

BRUCE DEAN POOLAW

MD 11-264

All mail, currently being held or hereafter received, addressed to the Kiowa Tribe of Oklahoma at P.O. Box 369, Carnegie, OK 73015-0369, is to be delivered as directed by Ronald D. Twohatchet.

William A. Campbell
Judicial Officer

In the Matter of the Petition by

November 17, 2011

DEBRA ANN HAWKINS

P.S. Docket No. AO 11-243

APPEARANCE FOR DISPUTANT
DEBRA ANN HAWKINS:

APPEARANCE FOR DISPUTANT
PANDORA DAVIS:

INITIAL DECISION

On October 6, 2011, I issued an *Order to Show Cause* in this matter. In that Order I noted that although Respondent filed a *Notice of Appearance* on August 22, 2011, no *Answer* had been filed in this case. In that Order I gave Respondent until October 14, 2011, to file an *Answer* and explain the delay. A review of Postal Service records indicates that the *Order to Show Cause* was received by Respondent on October 14, 2011. Respondent did not respond to the *Order to Show Cause*, nor did Respondent request additional time to do so. Respondent is in default in this case.

Accordingly, Petitioner is entitled to judgment in her favor.

ORDER

The Petition is GRANTED. Respondent may not collect the debt of \$39,539 by administrative offset.

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petition by

March 15, 2012

DOLORES P. LOPEZ

P.S. Docket No. DCA 11-263

APPEARANCE FOR PETITIONER:

Dolores P. Lopez

T.J. Amos

APPEARANCE FOR RESPONDENT:

Sheila Shannon

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Dolores Lopez, filed a Petition for Hearing on August 31, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$435.06 based upon unpaid health benefit premiums. A hearing was conducted on December 22, 2011, in Dallas, Texas.¹ The following findings are based upon the record.

FINDINGS OF FACT

1. During pay periods 21/2007 through 05/2008, Respondent did not collect Petitioner's portion of her Federal Employee Health Benefit (FEHB) premiums by payroll deduction from her salary following Petitioner's return from a workers' compensation absence (Tr., p. 23; Respondent's Exh. 13; Petition Attachment).²

2. Respondent issued a Notice of Involuntary Administrative Salary Offsets to Petitioner on August 5, 2011 (Petition attachment).

¹ The undersigned Administrative Law Judge presided via speaker telephone from the Judicial Officer Courtroom in Arlington, Virginia.

² Citations to exhibits admitted into the record are abbreviated to "Respondent's Exh." or "Petitioner's Exh." Citations to the Transcript are abbreviated to "Tr., p__."

3. The Debt Collection Act Petition was timely filed.

DECISION

This Petition asks me to decide whether Petitioner is responsible for payment of her portion of FEHB premiums that Respondent contends it paid on behalf of Petitioner after she returned from a workers' compensation absence in 2007. Regulations governing FEHB are found in 5 C.F.R. Part 890. Part of the cost of an employee's health insurance is paid by the employing agency and the remainder of the premium is paid by the employee through payroll deductions each pay period. An employee is deemed to incur indebtedness to the United States in any pay period during which enrollment in the FEHB continues but a deduction for, or direct payment of, the employee's share of the premium is not made. 5 C.F.R. §890.501 and §890.502.

Under the Debt Collection Act, the initial burden lies with Respondent to establish that a debt exists for which Petitioner is liable. *Victoria Bingham*, P.S. Docket No. DCA 09-177 (December 7, 2009). In a case involving FEHB premiums, Respondent must at least establish that Petitioner was enrolled in FEHB during the period in which it seeks the overdue premiums. *Michelle Campbell*, P.S. Docket Nos. DCA 07-219 and 07-210 (June 3, 2008)(facts to support proof of FEHB coverage include enrollment in FEHB and payments of insurance premium); *Marcus Carter*, P.S. Docket No. DCA 08-323 (December 23, 2008)(Respondent failed to prove enrollment in FEHB during pay period); *Anthony Villanueva*, P.S. Docket No. DCA 10-107 (October 26, 2010)(Petitioner admitted enrollment in FEHB).

Although Respondent submitted a letter from the Plant Manager dated August 11, 2011, in which the Postal Service claims that it paid health benefit premiums during this period on Petitioner's behalf, no supporting evidence of this payment exists in the record (Respondent's Exh. 8). Also, Respondent did not provide any testimonial or documentary evidence to prove that Petitioner was covered by FEHB during the period in which Respondent seeks collection of the overdue premiums. Respondent offered no testimony from any witness with knowledge of Petitioner's election of FEHB. No enrollment form was offered into evidence that would tend to suggest Petitioner sought these benefits during this timeframe. For her part, Petitioner could not testify to any certainty that she or her family used insurance benefits during the period for which payment is sought, nor did she recall executing any election form for her FEHB coverage. Thus the record lacks sufficient evidence to prove that Petitioner was enrolled in FEHB during the pay periods at issue.³ Accordingly, Respondent has failed to meet its initial burden to establish that a debt exists for which Petitioner is liable.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

³ While Respondent did submit payroll records to establish that Respondent did not collect Petitioner's share of FEHB premium payments during the period in question (Finding 1), the threshold burden remains whether Respondent can prove that Petitioner was enrolled during the same time period. Payroll records reflecting nonpayment of premium by the employee do not prove that Petitioner was covered by FEHB. Likewise, the invoice issued to Petitioner does not meet that burden. In Debt Collection Act cases, we have long held that existence of an invoice creating the debt is insufficient to prove the debt. *Eugene B. Marley, Jr.*, P.S. Docket No. AO 01-35 (I.D. August 6, 2001), *finalized*, (Order September 25, 2001)(an invoice "is insufficient to establish the amount or the existence of a valid debt owed by Petitioner to the Postal Service"); *Glen Patterson*, P.S. Docket No. AO 05-62 (I.D. July 26, 2005), *aff'd*, (P.S.D. October 6, 2005)("invoices are not sufficient to prove the amount alleged"); *Victoria Bingham*, P.S. Docket No. DCA 09-177 (December 7, 2009)(existence of invoice does not prove the debt).

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petition by

March 8, 2012

MALVIN W. HARMON

P.S. Docket No. DCA 11-326

APPEARANCE FOR PETITIONER:

Harvey G. Orr

APPEARANCE FOR RESPONDENT:

Ms. Sharon Keels

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

In a telephone conference conducted on March 8, 2012, Respondent admitted that the debt of \$9,053.60 that was the subject of this Debt Collection Act Petition was the result of an administrative error and that Petitioner is not liable for the debt. *Order and Memorandum of Telephone Conference* dated March 8, 2012.

During the pendency of this matter, Respondent collected from Petitioner \$1,264.30 as an offset against this debt. Respondent shall refund the sum of \$1,264.30 to Petitioner.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary. Respondent shall refund the sum of \$1,264.30 to Petitioner within thirty (30) days of the date of this Order.

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petition by

March 6, 2012

PORTIA C. HARGROVE

P.S. Docket No. DCA 12-17

APPEARANCE FOR PETITIONER:

Portia C. Hargrove

APPEARANCE FOR RESPONDENT:

Dorothy J. Bush

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Respondent, U.S. Postal Service, issued a Notice of Involuntary Administrative Salary Offsets, dated December 27, 2011, to Petitioner, Portia C. Hargrove. Respondent's Notice determined that Petitioner owed it a \$58.85 debt and that it intended to offset that debt against Petitioner's salary.

In an undated document which was received in this office and docketed on January 9, 2012, Petitioner filed a Petition for hearing under the Debt Collection Act, contesting liability for the alleged debt. The *Notice of Docketing of Petition* required Respondent to file its answer by January 27, 2012. Respondent's representative received the *Notice of Docketing* on January 17, 2012.

Respondent did not respond.

Accordingly, on February 7, 2012, I issued an *Order to Show Cause*. That *Order* explained that Respondent had neither filed its answer nor requested an extension of time in which to do so. The Order directed Respondent to file the required answer so that I receive it no later than February 21, 2012, or show cause by that date why it is unable to do so. I specifically warned Respondent

that its failure to file its answer or show cause by that date would result in my granting this Petition without further notice.

Respondent's representative received the *Order to Show Cause* on February 10, 2012. Respondent did not respond as required, and has filed nothing in this case.

Accordingly, I find Respondent to be in default. Respondent is prohibited from collecting from Petitioner the alleged \$58.85 debt at issue by involuntary administrative salary offsets.

The Petition is GRANTED.

Gary E. Shapiro
Administrative Judge

In the Matter of the Petition by

March 7, 2012

MICHAEL W. ERVIN

P.S. Docket No. DCA 12-24

APPEARANCE FOR PETITIONER:
Charles Scialla

APPEARANCE FOR RESPONDENT:
Jesse Landy Vargas

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Michael W. Ervin filed a Petition for a hearing under the Debt Collection Act of 1982 after receiving a Notice of Involuntary Administrative Salary Offsets, dated January 8, 2012, from Respondent, United States Postal Service. In its Answer to the Petition, Respondent stated that it would withdraw its request for, and clear Petitioner's liability for, payment of \$2,880.00, which was the amount sought in the January 8, 2012 Notice.

By Order dated February 14, 2012, the parties were advised that a Final Decision would be issued in Petitioner's favor unless either party objected and showed cause why this should not be done. Neither party having objected within the time allowed, the Petition is granted. Respondent may not withhold \$2,880.00 from Petitioner's pay on an involuntary basis.

David I. Brochstein
Administrative Judge

March 14, 2012

In the Matter of a Mail Dispute Between

TERRY BLASINGAME

and

MICHELLE BLAIN

MD 12-58

APPEARANCE FOR DISPUTANT

Terry Blasingame:

APPEARANCE FOR DISPUTANT

Michelle Blain:

INITIAL DECISION

The disputants contest mail addressed to Lake Arrowhead Village Pharmacy, P.O. Box 2945, Lake Arrowhead, CA 92352-2945. Disputant Michelle Blain a/k/a Michelle Dresser a/k/a Michelle Blain Dresser, bases her claim on her ownership of the pharmacy while Disputant Terry Blasingame bases her claim on being its pharmacist-in-charge.

The Judicial Officer has directed the Lake Arrowhead Postmaster to hold the mail pending resolution of this mail dispute. I recommend that the Judicial Officer direct the postmaster to release the mail and deliver future mail addressed to Lake Arrowhead Village Pharmacy to Disputant Blain, or as she directs.

FINDINGS OF FACT

1. The Lake Arrowhead Village Pharmacy is a California corporation owned by Disputant Blain, who is also its president (February 26 and 28, 2012 Declarations of Disputant Blain; February 26, 2012 Blain Declaration attachments; Disputant Blain's Exhibits 4, 7 to submission to Postal Service Counsel).

2. While the pharmacy is located at 28200 Highway 189, Lake Arrowhead, California, it receives mail at Post Office Box 2945, Lake Arrowhead, California (Attachments to February 26, 2012 Blain Declaration; Disputant Blain's attachments to submission to Postal Service Counsel). In 2002, this post office box was opened by Ms. Blain, and she has been identified as the authorized recipient of the mail at the post office box since that time (February 26, 2012 Blain Declaration at p. 1; February 28, 2012 Blain Declaration).

3. Amidst a variety of investigations by various governmental entities regarding alleged wrongdoing associated with the pharmacy, in June 2011, Ms. Blain hired Ms. Blasingame as an employee to work as the pharmacy's pharmacist-in-charge (February 26, 2012 Blain Declaration at p. 2; Disputant Blain's Exhibits 6-7 to submission to Postal Service Counsel; Blasingame Declaration at p. 1).

4. The pharmacy's bank account identifies Ms. Blain as its owner and president, and she has been paying bills of the pharmacy from its corporate bank account (February 26, 2012 Blain Declaration Exhibit 2; Disputant Blain's Exhibit 5 to submission to Postal Service Counsel).

5. In August 2011, Ms. Blasingame entered into an agreement with Ms. Blain to purchase the pharmacy, and unidentified sales proceeds have been held in escrow (Attachment to March 6, 2012 letter from Postal Service Counsel, submitted by Disputant Blasingame). However the sale of the pharmacy has never been completed and Ms. Blain has requested that the escrow be cancelled (Blain Declaration at p. 1-2; Disputant Blain's Exhibits 3-5 to submission to Postal Service Counsel; Blasingame Declaration at p. 1).

6. In anticipation of purchasing the pharmacy, Ms. Blasingame spent considerable money paying back rent and renovating the pharmacy, and became personally responsible to ensure payments to a drug manufacturer and to the pharmacy's lessor for its lease payments (Blasingame Declaration at p. 1). Ms. Blasingame has been operating the pharmacy as pharmacist-in-charge

(Blasingame Declaration at p. 2-3)

DECISION

Accordingly, the Petition is denied. Respondent may collect \$6,769.64 from
Petitioner's pay.³

David I. Brochstein
Administrative Judge

Accordingly, the Petition is denied. Respondent may collect \$6,769.64 from
Petitioner's pay.³

David I. Brochstein
Administrative Judge

³ The parties are reminded that the "15 percent of disposable pay" rate of recovery set out in the Debt Collection Act is a maximum. The parties are free to negotiate a different rate.

In the Matter of a Mail Dispute

February 1, 2012

RONALD D. TWOHATCHET

and

BRUCE DEAN POOLAW

MD 11-264

APPEARANCE FOR DISPUTANT

Amos E. Black III, Esq.

APPEARANCE FOR DISPUTANT

C. W. Bill Morgan, Esq.

POSTAL SERVICE DECISION

On December 5, 2011, an Initial Decision was issued in which an Administrative Judge determined that mail addressed to the Kiowa Tribe of Oklahoma at P.O. Box 369, Carnegie, OK 73015-0369, should be delivered as directed by Disputant Ronald D. Twohatchet. Disputant Bruce Dean Poolaw has filed an appeal from the Initial Decision. Mr. Twohatchet opposes the appeal.

On appeal, Mr. Poolaw argues the Kiowa Hearing Board Ordinance (Ordinance), which requires all five Hearing Board members be present to determine whether sufficient evidence justifies a recall election, was erroneously relied on by the Administrative Judge. Mr. Poolaw argues that the Hearing Board Ordinance is invalid because it was not approved by the Assistant Secretary for Indian Affairs or his authorized representative as required under Section 2(g) of Article 5 of the Kiowa Constitution.¹ If the Ordinance is invalid, then the judge's

¹ Article 5, Section 2(g) of the Kiowa Constitution reads

determination that the recall election was not authorized because the Hearing Board decided the appeal of the Business Committee's decision to refer the recall proposal with less than five members present was incorrect.

The record does not support Mr. Poolaw's argument, and he has not shown that the Initial Decision is clearly erroneous or that any other grounds exist for the Judicial Officer to exercise his discretion to grant review of the Initial Decision. There is no evidence that the Kiowa Business Committee ever sought the approval of the Assistant Secretary of Indian Affairs when passing ordinances or otherwise enacting tribal law. Accordingly, the Hearing Board Ordinance is found to be binding, and the finding that the Hearing Board's decision on the recall appeal was invalid under that Ordinance was correct.²

Since the Judicial Officer has determined he will not exercise his discretion to grant review of the Initial Decision, the Initial Decision is the final agency decision as provided in 39 C.F.R. § 965.12.

The parties are reminded that this decision determines only the right to delivery of the mail in dispute not the ownership of the mail. If either party receives mail intended for the other, that party is responsible for forwarding such mail to the intended recipient.

Section 2. The Kiowa Business Committee shall be empowered to take necessary action on the following:...

(g) To promulgate and enforce ordinances and codes governing law and order to protect the peace, health, safety and general welfare, on land determined to be within tribal jurisdiction subject to the approval of the Assistant Secretary for Indian Affairs or his authorized representative.

² Mr. Poolaw also argues that the Administrative Judge misinterpreted the section of the Kiowa Constitution regarding filling vacancies on the Kiowa Business Committee. Based on the finding that the recall election was invalid, it is not necessary to address this argument.

William A. Campbell
Judicial Officer

February 1, 2012

TO THE POSTMASTER AT:

ANADARKO, OK 73005-9998

RE: The Mail Dispute Between

RONALD D. TWOHATCHET

and

BRUCE DEAN POOLAW

MD 11-264

All mail, currently being held or hereafter received, addressed to the
Kiowa Tribe of Oklahoma at P.O. Box 369, Carnegie, OK 73015-0369, is to be
delivered as directed by Ronald D. Twohatchet.

William A. Campbell
Judicial Officer

In the Matter of the Petition by

November 17, 2011

DEBRA ANN HAWKINS

P.S. Docket No. AO 11-243

APPEARANCE FOR DISPUTANT
DEBRA ANN HAWKINS:

APPEARANCE FOR DISPUTANT
PANDORA DAVIS:

INITIAL DECISION

On October 6, 2011, I issued an *Order to Show Cause* in this matter. In that Order I noted that although Respondent filed a *Notice of Appearance* on August 22, 2011, no *Answer* had been filed in this case. In that Order I gave Respondent until October 14, 2011, to file an *Answer* and explain the delay. A review of Postal Service records indicates that the *Order to Show Cause* was received by Respondent on October 14, 2011. Respondent did not respond to the *Order to Show Cause*, nor did Respondent request additional time to do so. Respondent is in default in this case. Accordingly, Petitioner is entitled to judgment in her favor.

ORDER

The Petition is GRANTED. Respondent may not collect the debt of \$39,539 by administrative offset.

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petition by

March 15, 2012

DOLORES P. LOPEZ

P.S. Docket No. DCA 11-263

APPEARANCE FOR PETITIONER:

Dolores P. Lopez

T.J. Amos

APPEARANCE FOR RESPONDENT:

Sheila Shannon

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Dolores Lopez, filed a Petition for Hearing on August 31, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$435.06 based upon unpaid health benefit premiums. A hearing was conducted on December 22, 2011, in Dallas, Texas.¹ The following findings are based upon the record.

FINDINGS OF FACT

1. During pay periods 21/2007 through 05/2008, Respondent did not collect Petitioner's portion of her Federal Employee Health Benefit (FEHB) premiums by payroll deduction from her salary following Petitioner's return from a workers' compensation absence (Tr., p. 23; Respondent's Exh. 13; Petition Attachment).²

2. Respondent issued a Notice of Involuntary Administrative Salary Offsets to Petitioner on August 5, 2011 (Petition attachment).

¹ The undersigned Administrative Law Judge presided via speaker telephone from the Judicial Officer Courtroom in Arlington, Virginia.

² Citations to exhibits admitted into the record are abbreviated to "Respondent's Exh." or "Petitioner's Exh." Citations to the Transcript are abbreviated to "Tr., p_."

3. The Debt Collection Act Petition was timely filed.

DECISION

This Petition asks me to decide whether Petitioner is responsible for payment of her portion of FEHB premiums that Respondent contends it paid on behalf of Petitioner after she returned from a workers' compensation absence in 2007. Regulations governing FEHB are found in 5 C.F.R. Part 890. Part of the cost of an employee's health insurance is paid by the employing agency and the remainder of the premium is paid by the employee through payroll deductions each pay period. An employee is deemed to incur indebtedness to the United States in any pay period during which enrollment in the FEHB continues but a deduction for, or direct payment of, the employee's share of the premium is not made. 5 C.F.R. §890.501 and §890.502.

Under the Debt Collection Act, the initial burden lies with Respondent to establish that a debt exists for which Petitioner is liable. *Victoria Bingham*, P.S. Docket No. DCA 09-177 (December 7, 2009). In a case involving FEHB premiums, Respondent must at least establish that Petitioner was enrolled in FEHB during the period in which it seeks the overdue premiums. *Michelle Campbell*, P.S. Docket Nos. DCA 07-219 and 07-210 (June 3, 2008)(facts to support proof of FEHB coverage include enrollment in FEHB and payments of insurance premium); *Marcus Carter*, P.S. Docket No. DCA 08-323 (December 23, 2008)(Respondent failed to prove enrollment in FEHB during pay period); *Anthony Villanueva*, P.S. Docket No. DCA 10-107 (October 26, 2010)(Petitioner admitted enrollment in FEHB).

Although Respondent submitted a letter from the Plant Manager dated August 11, 2011, in which the Postal Service claims that it paid health benefit premiums during this period on Petitioner's behalf, no supporting evidence of this payment exists in the record (Respondent's Exh. 8). Also, Respondent did not provide any testimonial or documentary evidence to prove that Petitioner was covered by FEHB during the period in which Respondent seeks collection of the overdue premiums. Respondent offered no testimony from any witness with knowledge of Petitioner's election of FEHB. No enrollment form was offered into evidence that would tend to suggest Petitioner sought these benefits during this timeframe. For her part, Petitioner could not testify to any certainty that she or her family used insurance benefits during the period for which payment is sought, nor did she recall executing any election form for her FEHB coverage. Thus the record lacks sufficient evidence to prove that Petitioner was enrolled in FEHB during the pay periods at issue.³ Accordingly, Respondent has failed to meet its initial burden to establish that a debt exists for which Petitioner is liable.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

³ While Respondent did submit payroll records to establish that Respondent did not collect Petitioner's share of FEHB premium payments during the period in question (Finding 1), the threshold burden remains whether Respondent can prove that Petitioner was enrolled during the same time period. Payroll records reflecting nonpayment of premium by the employee do not prove that Petitioner was covered by FEHB. Likewise, the invoice issued to Petitioner does not meet that burden. In Debt Collection Act cases, we have long held that existence of an invoice creating the debt is insufficient to prove the debt. *Eugene B. Marley, Jr.*, P.S. Docket No. AO 01-35 (I.D. August 6, 2001), *finalized*, (Order September 25, 2001)(an invoice "is insufficient to establish the amount or the existence of a valid debt owed by Petitioner to the Postal Service"); *Glen Patterson*, P.S. Docket No. AO 05-62 (I.D. July 26, 2005), *aff'd*, (P.S.D. October 6, 2005)("invoices are not sufficient to prove the amount alleged"); *Victoria Bingham*, P.S. Docket No. DCA 09-177 (December 7, 2009)(existence of invoice does not prove the debt).

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petition by

March 8, 2012

MALVIN W. HARMON

P.S. Docket No. DCA 11-326

APPEARANCE FOR PETITIONER:

Harvey G. Orr

APPEARANCE FOR RESPONDENT:

Ms. Sharon Keels

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

In a telephone conference conducted on March 8, 2012, Respondent admitted that the debt of \$9,053.60 that was the subject of this Debt Collection Act Petition was the result of an administrative error and that Petitioner is not liable for the debt. *Order and Memorandum of Telephone Conference* dated March 8, 2012.

During the pendency of this matter, Respondent collected from Petitioner \$1,264.30 as an offset against this debt. Respondent shall refund the sum of \$1,264.30 to Petitioner.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary. Respondent shall refund the sum of \$1,264.30 to Petitioner within thirty (30) days of the date of this Order.

James G. Gilbert
Chief Administrative Law Judge

In the Matter of the Petition by

March 6, 2012

PORTIA C. HARGROVE

P.S. Docket No. DCA 12-17

APPEARANCE FOR PETITIONER:

Portia C. Hargrove

APPEARANCE FOR RESPONDENT:

Dorothy J. Bush

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Respondent, U.S. Postal Service, issued a Notice of Involuntary Administrative Salary Offsets, dated December 27, 2011, to Petitioner, Portia C. Hargrove. Respondent's Notice determined that Petitioner owed it a \$58.85 debt and that it intended to offset that debt against Petitioner's salary.

In an undated document which was received in this office and docketed on January 9, 2012, Petitioner filed a Petition for hearing under the Debt Collection Act, contesting liability for the alleged debt. The *Notice of Docketing of Petition* required Respondent to file its answer by January 27, 2012. Respondent's representative received the *Notice of Docketing* on January 17, 2012.

Respondent did not respond.

Accordingly, on February 7, 2012, I issued an *Order to Show Cause*. That *Order* explained that Respondent had neither filed its answer nor requested an extension of time in which to do so. The Order directed Respondent to file the required answer so that I receive it no later than February 21, 2012, or show cause by that date why it is unable to do so. I specifically warned Respondent

that its failure to file its answer or show cause by that date would result in my granting this Petition without further notice.

Respondent's representative received the *Order to Show Cause* on February 10, 2012. Respondent did not respond as required, and has filed nothing in this case.

Accordingly, I find Respondent to be in default. Respondent is prohibited from collecting from Petitioner the alleged \$58.85 debt at issue by involuntary administrative salary offsets.

The Petition is GRANTED.

Gary E. Shapiro
Administrative Judge

In the Matter of the Petition by

March 7, 2012

MICHAEL W. ERVIN

P.S. Docket No. DCA 12-24

APPEARANCE FOR PETITIONER:
Charles Scialla

APPEARANCE FOR RESPONDENT:
Jesse Landy Vargas

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Michael W. Ervin filed a Petition for a hearing under the Debt Collection Act of 1982 after receiving a Notice of Involuntary Administrative Salary Offsets, dated January 8, 2012, from Respondent, United States Postal Service. In its Answer to the Petition, Respondent stated that it would withdraw its request for, and clear Petitioner's liability for, payment of \$2,880.00, which was the amount sought in the January 8, 2012 Notice.

By Order dated February 14, 2012, the parties were advised that a Final Decision would be issued in Petitioner's favor unless either party objected and showed cause why this should not be done. Neither party having objected within the time allowed, the Petition is granted. Respondent may not withhold \$2,880.00 from Petitioner's pay on an involuntary basis.

David I. Brochstein
Administrative Judge

March 14, 2012

In the Matter of a Mail Dispute Between

TERRY BLASINGAME

and

MICHELLE BLAIN

MD 12-58

APPEARANCE FOR DISPUTANT

Terry Blasingame:

APPEARANCE FOR DISPUTANT

Michelle Blain:

INITIAL DECISION

The disputants contest mail addressed to Lake Arrowhead Village Pharmacy, P.O. Box 2945, Lake Arrowhead, CA 92352-2945. Disputant Michelle Blain a/k/a Michelle Dresser a/k/a Michelle Blain Dresser, bases her claim on her ownership of the pharmacy while Disputant Terry Blasingame bases her claim on being its pharmacist-in-charge.

The Judicial Officer has directed the Lake Arrowhead Postmaster to hold the mail pending resolution of this mail dispute. I recommend that the Judicial Officer direct the postmaster to release the mail and deliver future mail addressed to Lake Arrowhead Village Pharmacy to Disputant Blain, or as she directs.

FINDINGS OF FACT

1. The Lake Arrowhead Village Pharmacy is a California corporation owned by Disputant Blain, who is also its president (February 26 and 28, 2012 Declarations of Disputant Blain; February 26, 2012 Blain Declaration attachments; Disputant Blain's Exhibits 4, 7 to submission to Postal Service Counsel).

2. While the pharmacy is located at 28200 Highway 189, Lake Arrowhead, California, it receives mail at Post Office Box 2945, Lake Arrowhead, California (Attachments to February 26, 2012 Blain Declaration; Disputant Blain's attachments to submission to Postal Service Counsel). In 2002, this post office box was opened by Ms. Blain, and she has been identified as the authorized recipient of the mail at the post office box since that time (February 26, 2012 Blain Declaration at p. 1; February 28, 2012 Blain Declaration).

3. Amidst a variety of investigations by various governmental entities regarding alleged wrongdoing associated with the pharmacy, in June 2011, Ms. Blain hired Ms. Blasingame as an employee to work as the pharmacy's pharmacist-in-charge (February 26, 2012 Blain Declaration at p. 2; Disputant Blain's Exhibits 6-7 to submission to Postal Service Counsel; Blasingame Declaration at p. 1).

4. The pharmacy's bank account identifies Ms. Blain as its owner and president, and she has been paying bills of the pharmacy from its corporate bank account (February 26, 2012 Blain Declaration Exhibit 2; Disputant Blain's Exhibit 5 to submission to Postal Service Counsel).

5. In August 2011, Ms. Blasingame entered into an agreement with Ms. Blain to purchase the pharmacy, and unidentified sales proceeds have been held in escrow (Attachment to March 6, 2012 letter from Postal Service Counsel, submitted by Disputant Blasingame). However the sale of the pharmacy has never been completed and Ms. Blain has requested that the escrow be cancelled (Blain Declaration at p. 1-2; Disputant Blain's Exhibits 3-5 to submission to Postal Service Counsel; Blasingame Declaration at p. 1).

6. In anticipation of purchasing the pharmacy, Ms. Blasingame spent considerable money paying back rent and renovating the pharmacy, and became personally responsible to ensure payments to a drug manufacturer and to the pharmacy's lessor for its lease payments (Blasingame Declaration at p. 1). Ms. Blasingame has been operating the pharmacy as pharmacist-in-charge (Blasingame Declaration at p. 2-3).

DECISION

Both parties claim a superior right to receive mail addressed to the pharmacy at its post office box address, and both claim that the mail is needed to pay bills and perform operational activities for the pharmacy. The parties agree, however, that Ms. Blain remains the owner and president of the pharmacy. They also agree that Ms. Blasingame has been operating it as pharmacist-in-charge. Ms. Blasingame acknowledges that the sale of the pharmacy to her has not been completed.

Postal regulations provide that mail addressed to a corporation at the corporation's address should be delivered as addressed, and that if

disagreement arises about where any such mail should be delivered, it must be delivered according to the order of the corporation's president or equivalent official. Postal Operations Manual § 614.1. Although the parties formerly intended to transfer ownership (and the resulting equivalence of its presidency) of the pharmacy from Ms. Blain to Ms. Blasingame, the sale has not occurred (Finding 5). As such, the executory contract does not alter the result that Ms. Blain remains the president of the pharmacy entitled to receive the disputed mail. *See Jay Enterprises, Inc. of NC and Wendy Blanks*, P.S. Docket No. MD 10-57 (I.D. April 23, 2010). Ms. Blasingame's status remains as employee, which is insufficient to confer a superior right to receive the disputed mail. *Id.*

The parties' various allegations of criminal activities and misconduct largely are unproved, and remain irrelevant to the application of the postal regulations. Given the continuing legal disputes involving these parties however, I must emphasize that this decision deals only with the delivery of mail not its ownership. If either party obtains a court order directing delivery of the mail, the mail will be delivered according to the court order. Postal Operations Manual § 616.3.

This initial decision recommends that the Judicial Officer should issue an order directing the Lake Arrowhead Postmaster to deliver all held mail and to deliver future mail addressed to Lake Arrowhead Village Pharmacy, P.O. Box 2945, Lake Arrowhead, CA 92352-2945, as addressed for receipt by Ms. Blain, or as forwarded as Ms. Blain may otherwise direct.

September 21, 2011

In the Matter of the Petition by

HERMENEGILDO LOPEZ

at
New York,

P.S. Docket No. DCA 11-128

APPEARANCE FOR PETITIONER:

Albert E. Lum

APPEARANCE FOR RESPONDENT:

Katherine Ferlauto

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Hermengildo Lopez, filed a Petition for Hearing on April 13, 2011.

Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$1,760 based upon a shortage in the unit reserve for which Petitioner was

custodian. A hearing was conducted on July 12, 2011, in Islandia, New York.^[1] The following findings are based upon the record.

FINDINGS OF FACT

1. Petitioner was served with a Notice of Involuntary Administrative Salary Offsets dated April 9, 2011 (Petition Attachment).

2. Petitioner was unit reserve custodian for a subsidiary of the Merrick Post Office referred to as Bank Plaza Station at all relevant times (Tr., p. 16).^[2]

3. As the result of the Merrick Post Office unit reserve custodian's prolonged absence during the summer of 2010, Petitioner transferred stock from the Bank Plaza Station unit reserve directly to the retail floor stock at the Merrick Post Office (Tr., pp. 65-66).

4. Petitioner's practice was to transfer the stock from the Bank Plaza Station, maintain handwritten notes of the transfer, and execute the appropriate paperwork for the transfer after the fact (*id.*).

5. As part of these stock transfers, sometime prior to September 25, 2010, Petitioner transferred 100 books of Item Number 678800 (hereafter "*Love King and Queen*

disagreement arises about where any such mail should be delivered, it must be delivered according to the order of the corporation's president or equivalent official. Postal Operations Manual § 614.1. Although the parties formerly intended to transfer ownership (and the resulting equivalence of its presidency) of the pharmacy from Ms. Blain to Ms. Blasingame, the sale has not occurred (Finding 5). As such, the executory contract does not alter the result that Ms. Blain remains the president of the pharmacy entitled to receive the disputed mail. See *Jay Enterprises, Inc. of NC and Wendy Blanks*, P.S. Docket No. MD 10-57 (I.D. April 23, 2010). Ms. Blasingame's status remains as employee, which is insufficient to confer a superior right to receive the disputed mail. *Id.*

The parties' various allegations of criminal activities and misconduct largely are unproved, and remain irrelevant to the application of the postal regulations. Given the continuing legal disputes involving these parties however, I must emphasize that this decision deals only with the delivery of mail not its ownership. If either party obtains a court order directing delivery of the mail, the mail will be delivered according to the court order. Postal Operations Manual § 616.3.

This initial decision recommends that the Judicial Officer should issue an order directing the Lake Arrowhead Postmaster to deliver all held mail and to deliver future mail addressed to Lake Arrowhead Village Pharmacy, P.O. Box 2945, Lake Arrowhead, CA 92352-2945, as addressed for receipt by Ms. Blain, or as forwarded as Ms. Blain may otherwise direct.

Gary E. Shapiro
Administrative Judge

disagreement arises about where any such mail should be delivered, it must be delivered according to the order of the corporation's president or equivalent official. Postal Operations Manual § 614.1. Although the parties formerly intended to transfer ownership (and the resulting equivalence of its presidency) of the pharmacy from Ms. Blain to Ms. Blasingame, the sale has not occurred (Finding 5). As such, the executory contract does not alter the result that Ms. Blain remains the president of the pharmacy entitled to receive the disputed mail. See *Jay Enterprises, Inc. of NC and Wendy Blanks*, P.S. Docket No. MD 10-57 (I.D. April 23, 2010). Ms. Blasingame's status remains as employee, which is insufficient to confer a superior right to receive the disputed mail. *Id.*

The parties' various allegations of criminal activities and misconduct largely are unproved, and remain irrelevant to the application of the postal regulations. Given the continuing legal disputes involving these parties however, I must emphasize that this decision deals only with the delivery of mail not its ownership. If either party obtains a court order directing delivery of the mail, the mail will be delivered according to the court order. Postal Operations Manual § 616.3.

This initial decision recommends that the Judicial Officer should issue an order directing the Lake Arrowhead Postmaster to deliver all held mail and to deliver future mail addressed to Lake Arrowhead Village Pharmacy, P.O. Box 2945, Lake Arrowhead, CA 92352-2945, as addressed for receipt by Ms. Blain, or as forwarded as Ms. Blain may otherwise direct.

Gary E. Shapiro
Administrative Judge

September 1, 2011

In the Matter of the Petition by

THOMAS KERRIGAN, JR

P.S. Docket No. DCA 11-45

APPEARANCE FOR PETITIONER

Albert E. Lum

APPEARANCE FOR RESPONDENT

Rodney D. Thomas

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Thomas Kerrigan, Jr., filed a Petition for Hearing on February 22, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$6,553.

FINDINGS OF FACT

1. Petitioner was served with a Notice of Involuntary Administrative Salary Offsets dated February 4, 2011 (Petition attachment).
2. On May 20, 2011, Respondent notified the Court that it was unable to obtain any records to support the debt it sought in the Notice of Involuntary Administrative Salary Offsets.
3. On June 1, 2011, I issued an *Order to Show Cause* in which I expressed my intent to issue a decision in favor of Petitioner unless I received objection in writing from Respondent not later than June 21, 2011.
4. No objection was received by this office.

DECISION

Respondent is unable to meet its burden of proof under the Debt Collection Act of 1982. Accordingly, Petitioner is entitled to judgment in his favor.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

September 2, 2011

In the Matter of the Petition by

DANNY GRIGGS

at

Dallas, TX

P.S. Docket No. DCA 11-112

APPEARANCE FOR PETITIONER:

J. D. McAlester

APPEARANCE FOR RESPONDENT:

Racquel L. Foxworth

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Danny Griggs, filed a Petition for Hearing on March 25, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$2,379.02 based upon Respondent's calculation of health benefit premiums due following retroactive reinstatement of Petitioner's health insurance. A hearing was conducted on July 7, 2011, in Coppel, Texas.^[1] The following findings are based upon the record.

FINDINGS OF FACT

1. On January 8, 2008, Petitioner was removed from the Postal Service, and placed in a nonpay status pending an appeal of the removal action (Tr., pp. 30-31; 67).^[2]
2. Petitioner appealed his removal (Tr., p. 81).
3. Following Petitioner's challenge to his removal, an arbitration decision dated April 29, 2009, reinstated Petitioner retroactive to his removal date "with full seniority, no loss of pay and no loss of benefits" (Petitioner's Exh. 2).
4. Petitioner was reinstated on May 18, 2009, during pay period 11/2009 (Petitioner's Exh. 8).
5. Respondent pays the health insurance premiums for employees removed from the Postal Service for a period of 365 days from the date of separation while that employee remains in nonpay status pending an appeal of the removal action (Tr., pp. 66-70; *Employee and Labor Relations Manual* (ELM) §525.25).

6. After the 365 day period expires, Respondent ceases to pay health insurance premiums, and the employee is, in effect, without group health insurance coverage unless the employee makes other arrangements with the health insurance provider (*Id.*).
7. Respondent pays health insurance premiums for the benefit of all employees in a lump sum transfer to the insurance carrier (Tr., pp. 54-55).
8. Between pay period 4/2009 and pay period 11/2009, while Petitioner was in a nonpay status, he was denied pharmaceutical coverage under his health insurance on at least one occasion (Tr., pp. 88-89).
9. Upon Petitioner's reinstatement, Petitioner partially completed P.S. Form 8039 in which he indicated his desire to have his health benefits restored retroactively to his separation date (Respondent's Exh. 8).
10. A dispute with Respondent over unrelated matters delayed Petitioner's final execution of P.S. Form 8039 until July 1, 2010 (Respondent's Exh. 15; Tr., pp. 16-17).
11. The executed P.S. Form 8039, in which Petitioner requested retroactive reinstatement of his health insurance benefits, was processed by Respondent during pay period 24/2010 (Tr., p. 47).
12. After processing Petitioner's request on P.S. Form 8039 for retroactive reinstatement of his health insurance benefits, Respondent paid Petitioner's health benefit premiums from pay period 4/2009 through pay period 23/2010 (Tr., p. 48).
13. After pay period 24/2010, Petitioner began paying his portion of his health insurance premiums by deduction from his salary (*Id.*).
14. Petitioner was without health insurance coverage from pay period 4/2009 through pay period 23/2010, but his health insurance was reinstated in pay period 24/2010 retroactive to pay period 4/2009 (Tr., pp. 47-48).
15. Petitioner's portion of health insurance premiums for pay period 4/2009 through pay period 23/2010 totals \$2,379.02 (Respondent's Exh. 17; Tr., pp. 46-47).
16. On October 31, 2010, Petitioner was admitted to Medical City Dallas Hospital emergency room for treatment (Tr., pp. 96-97).

17. Upon his admission, Petitioner supplied the hospital with his medical insurance card for his then expired health insurance benefits (Tr., p. 97).

18. A record of account activity relating to Petitioner's account with Medical City Dallas Hospital for his emergency room visit on October 31, 2010, reflects Total Charges of \$3,973.55, and a remaining Account Balance of \$507.77 (Petitioner's Exh. 2; Tr., pp 96-98).

19. Petitioner made no payment on his hospital account (Tr., p. 96).

20. Petitioner did not resubmit any denied coverage claims after the reinstatement of his health benefits in pay period 24/2010 (Tr., pp. 93; 99)

21. Petitioner was served with a Notice of Involuntary Administrative Salary Offsets on February 25, 2011 (Respondent's Exh. 2).

22. Respondent did not challenge the timeliness of the filing of the Debt Collection Act Petition thus the Petition is deemed timely.

DECISION

This Petition asks me to decide whether Petitioner received health insurance coverage on a retroactive basis following his reinstatement to the Postal Service. If Petitioner did receive this coverage, he must pay the premiums due. If Respondent failed to pay the premiums due retroactively, no debt is due to Respondent. Under the Debt Collection Act, the initial burden lies with Respondent to establish that a debt exists for which Petitioner is liable. Victoria Bingham, P.S. Docket No. DCA 09-177 (December 7, 2009). To do so, Respondent must establish that it paid Petitioner's health insurance premiums, including Petitioner's portion of those health benefit premiums, for the period of time in question. Petitioner contends that Respondent has failed to present sufficient evidence of actual payment of his health insurance premiums in order to establish the debt. [3]

Respondent pays health insurance benefit premiums for 365 days following an employee's termination when that employee is in a nonpay status pending a decision in an appeal of a removal action (Finding 5). Consistent with that policy, Respondent paid the health benefit premiums for Petitioner through pay period 3/2009 following Petitioner's separation on January 8, 2008. After processing Petitioner's request on P.S. Form 8039 for retroactive

reinstatement of his health insurance benefits. Respondent paid Petitioner's retroactive health benefit premiums for the period from pay period 4/2009 through pay period 23/2010. From pay period 24/2010 onward Petitioner paid his portion of the health benefit premium through payroll deduction.

Petitioner argues that during the period of time for which he is now requested to pay his portion of the retroactive health benefit premium, pay period 4/2009 through pay period 23/2010, he was, in fact, without health insurance. Petitioner was denied health insurance coverage for prescriptions during the period of non-coverage prior to his date of reinstatement. Petitioner also testified that he was denied insurance coverage for a visit to the emergency room on October 31, 2010, and provided a copy of account activity pertaining to that hospital visit. Petitioner argues that these denials are evidence that Respondent never paid the retroactive health benefit premiums it now seeks to collect.

Petitioner is partially correct, in that during the period of time following pay period 4/2009, he had no health insurance coverage through Respondent. From pay period 4/2009 through pay period 23/2010, Respondent paid no health insurance premium to Petitioner's insurer. Thus the denials Petitioner experienced during this period were accurate at the time of the denial. Respondent does not dispute this fact. However, this fact is not dispositive in the determination of this debt.

Petitioner elected to have his health benefits reinstated retroactively upon his return to work. Retroactive application requires that Petitioner execute P.S. Form 8039 upon his return. Although Petitioner returned to work in May 2009, for reasons not relevant to this Petition, Petitioner delayed his final execution of this form until July 1, 2010. After execution of the form, Petitioner's health insurance benefits were reinstated retroactively. Respondent explained that payment of past due health insurance premiums under a retroactive application occurs "without fail" as a result of its ongoing business practice (Tr., pp. 54-55).

Retroactive application permits Petitioner to reapply for benefits denied him during his period of non-coverage (Tr., pp. 73-74; ELM §525.252a). Petitioner never made any post reinstatement claims for coverage for the pharmacy denials that occurred during his period of

non-coverage (Finding 20). While the issue of coverage for those denials is a matter between Petitioner and his health insurance carrier, it is not evidence that Respondent failed to pay retroactively the premiums due for the timeframe after pay period 3/2009. [4]

Further, Petitioner argues that his emergency room visit on October 31, 2010, reflects a denial of health insurance benefits during a time period in which Respondent claims to have paid such retroactive insurance premiums. My review of the evidence submitted by Petitioner leads me to the opposite conclusion. The record of account activity relates to Petitioner's account with Medical City Dallas Hospital for his emergency room visit on October 31, 2010, and reflects Total Charges of \$3,973.55, with an Account Balance of \$507.77 (Finding 18). Petitioner made no payments on this hospital account, but upon his entry to the hospital he provided the hospital with his insurance card for Respondent's insurance carrier (Finding 17; Tr., p. 97).

On October 31, 2010, the date of Petitioner's admission to the emergency room, Petitioner was without health insurance coverage. This account activity form acknowledges that fact in an entry dated November 13, 2010, and again on December 1, 2010, both of which reference a denial of insurance coverage. However, the December 1, 2010 entry indicates a conversation with Petitioner's health insurance provider and notes that the claim was being "adjusted" and that there would be a 14 to 30 day wait for that process. The activity report submitted by Petitioner does not include account activity after December 1, 2010, though such activity could be reasonably expected to appear on subsequent records not provided as evidence.

Given the discussion represented by the entry on December 1, 2010, as well as Petitioner's statement that he made no payments on this account, I conclude that the credit that reduced the bill from Total Charges of \$3,973.55 to a remaining balance of \$507.77 reflected a payment from Petitioner's insurer to the hospital for this claim sometime after December 1, 2010. In the absence of any other explanation for the partial payment of this bill, I find that the insurance company subsequently honored a portion of this insurance claim, following its initial denial of the claim for non-coverage, as the only reasonable explanation for

the reduction of the Total Charges by \$3,465.78. Accordingly, I also find that

Petitioner's health insurance premium payments were paid by Respondent retroactively to

cover the original date of this claim; otherwise, Petitioner would be responsible for the entire

[5]

balance of the hospital bill.

Respondent provided credible evidence about the standard practice utilized to pay

health insurance benefits for all employees, including those separated in a nonpay status

(Finding 6). Additionally, Respondent fully explained the process by which retroactive

reinstatement of health care benefits occur, including lump sum payment of premiums, which

also explained the delay in the reinstatement of Petitioner's health insurance benefits (Findings

5-7; 11). These facts, together with the evidence submitted regarding partial payment of the

hospital invoice, lead me to conclude that a preponderance of the evidence exists to support

Respondent's contention that it paid Petitioner's health insurance premiums retroactive to pay

[6]

period 4/2009. Accordingly, Petitioner owes Respondent for that portion of his health

insurance premiums from pay period 4/2009 through pay period 23/2010 in the amount of

\$2,379.02.

ORDER

The Petition is DENIED. Respondent may collect the \$2,379.02 debt by administrative

offset from Petitioner's salary.

James G. Gilbert

Chief Administrative Law Judge

[1]

The undersigned Administrative Law Judge presided via speaker telephone from the Judicial Officer

[2]

Courtroom in Arlington, Virginia.

[3]

Citations to exhibits admitted into the record are abbreviated as "Respondent's Exh." or "Petitioner's Exh."

[4]

Following the conclusion of Respondent's case, Petitioner's representative made an oral motion for judgment in favor of Petitioner on the grounds that Respondent had failed to meet its burden of proof in this case. I declined to rule on the motion at that time and took the motion under advisement. For the reasons set forth in this Decision, the motion is DENIED.

[4]

If Petitioner made such a claim after the date in which Respondent claims to have paid retroactive premiums and was subsequently denied coverage for the resubmitted claims that fact might prove persuasive on the issue of lack of retroactive payment. No such claim was made by Petitioner to his insurer, thus I have no evidence to

support Petitioner's contention of a lack of retroactive payment.

[5]

In doing so, I recognize that this evidence only suggests that retroactive payment was made for at least through October 31, 2010. However, given the previous testimony by Respondent's finance director regarding the standard business practice to pay all of the retroactive insurance payments in a lump sum, I find it more likely than not that Respondent did not deviate from that standard business practice.

[6]

Petitioner testified that he reinstated his health benefits during "open season" and that they were not reinstated by Respondent retroactive to pay period 4/2009. Beyond his testimony there was no evidence of any open season enrollment by Petitioner submitted to support this position.

September 21, 2011

In the Matter of the Petition by

BARRY E. GUY
at
Wilmington, DE

P.S. No. DCA 11-203

APPEARANCE FOR PETITIONER:
Barry E. Guy

APPEARANCE FOR RESPONDENT:
Deborah Kelly-Brown

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Barry Guy, filed a Petition for Hearing on June 20, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$134.90. Both parties were instructed to file documentary evidence and testimony in writing and under oath. The following findings are based upon the record.

FINDINGS OF FACT

1. Petitioner was served with a Notice of Involuntary Administrative Salary Offsets on or about June 8, 2011 (Petition attachment).
2. Respondent paid Petitioner's Federal Employee Health Benefit Premiums (FEHBP) for pay periods 4/2004 through 8/2004 following Petitioner's return from a worker's compensation absence [1] (*Declaration of Richard Warren* hereinafter Respondent's Exh. 1; Petition Attachment).
3. Respondent did not collect Petitioner's portion of his health insurance benefit premiums by payroll deduction from his salary during pay periods 4/2004 through 8/2004 (Respondent's Exh. 1; Petitioner's Exh. 4).
4. The Debt Collection Act Petition was timely filed.

DECISION

This Petition asks me to decide whether Petitioner is responsible for payment of his portion of FEHBP that Respondent paid on behalf of Petitioner after he returned from a worker's compensation absence in 2004. Regulations governing the FEHBP are found in 5 C.F.R. Part 890. Part of the cost of an employee's health insurance is paid by the employing agency and the remainder of the premium is paid by the employee through payroll deductions each pay period. An employee is deemed to incur indebtedness to the United States in any pay period during which enrollment in the FEHBP continues but a deduction for, or direct payment of, the employee's share of the premium is not made. 5 C.F.R. §890.501 and §890.502.

Under the Debt Collection Act, the initial burden lies with Respondent to establish that a debt exists for which Petitioner is liable. *Victoria Bingham*, P.S. Docket No. DCA 09-177 (December 7, 2009). To do so, Respondent must establish that it paid Petitioner's FEHBP, including Petitioner's portion of those health benefit premiums, for the period of time in question. *Danny Giggis*, P.S. Docket No. DCA 11-112 (September 12, 2011). Petitioner contends that Respondent has failed to present sufficient evidence of actual payment of his health insurance premiums.

Respondent provided sworn testimony that describes the process by which Respondent pays FEHBP on behalf of all employees (Respondent's Exh. 1). As stated in that exhibit:

[I]n the actual pay period in which the invoice is created, the USPS pays the combined total of employee and USPS contribution related to their invoice to their HB [FEHBP] carrier, up front. This allows the affected employees to receive coverage from their carriers without question. SSN [social security number] detail is not reported to OPM [Office of Personnel Management] or the carrier.

Petitioner seeks evidence of payment of his specific premium payment that is not generated by Respondent when it transfers the large sums of money for payment of FEHBP. The absence of this evidence does not mean that Respondent did not make the premium payments at issue. It is sufficient for Respondent to establish that the premium payment was made by submitting sworn testimony that Respondent followed its procedures and OPM regulations regarding payment of FEHBP during the relevant timeframe. See generally, *Danny Giggis*, P.S. Docket No. DCA 11-112 (September 12, 2011). Respondent has met that burden.

Petitioner submitted no evidence that would tend to prove that the premiums were not paid during this period. For example, Petitioner offered no evidence that he was denied health insurance coverage during the relevant timeframe. See, e.g., *Albert J. Schuere*, P.S. Docket No. DCA 03-102 (June 12, 2003). Thus, Petitioner has not refuted the testimony provided by Respondent that the health insurance benefit premiums at issue in this case were paid by Respondent in accordance with its standard practice and OPM regulations. Accordingly, Respondent is entitled to judgment in its favor.

ORDER

The Petition is DENIED. Respondent may collect the debt of \$134.90 by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

[1]

Citations to exhibits admitted into the record are abbreviated to "Respondent's Exh." or "Petitioner's Exh."

October 6, 2011

In the Matter of the Petition by

DENICE N. YOUNG

at

Reistertown, MD

P.S. Docket No. DCA 11-232

APPEARANCE FOR PETITIONER:

Denice N. Young

APPEARANCE FOR RESPONDENT:

Lydia F. Bracy

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Denice Young, filed a Petition for Hearing on July 14, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$507.57.

FINDINGS OF FACT

1. Petitioner was served with a Notice of Involuntary Administrative Salary Offsets dated June 15, 2011 (Petition attachment).
2. On October 3, 2011, Respondent filed a notice in this case in which Respondent stated that "it has been determined that the debt is not owed[.]"

DECISION AND ORDER

Respondent admits that the debt sought herein is not owed. Accordingly, Petitioner is entitled to judgment in her favor.

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

October 14, 2011

In the Matter of the Petition by

NANCY N. PHAN

at

Fountain Valley, CA

P.S. Docket No. DCA 11-202

APPEARANCE FOR PETITIONER:

Nancy N. Phan

APPEARANCE FOR RESPONDENT:

Richard Kaemerer

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Nancy N. Phan, filed a Petition for Hearing after receiving a Notice of Involuntary Administrative Salary Offsets from her postmaster. The Notice stated the intention of Respondent, United States Postal Service, to withhold \$4,671.60 from her salary to recover unpaid health benefit premiums.

Petitioner elected to have the case decided on written submissions. The parties were given time to file evidence and argument. Respondent filed documents with its Answer and two declarations. Petitioner submitted documents with her Petition. The following findings of fact are based on the entire record.

FINDINGS OF FACT

1. Petitioner has been an employee of the Postal Service since 1985 (Petition).
2. At some time before November of 2009, Petitioner was injured on the job and was transferred to the rolls of the Office of Workers' Compensation Programs ("OWCP"). She continued in the Federal Employee Health Benefit ("FEHB") Program, and OWCP paid her portion of the premiums by deduction from her OWCP benefit. (Petition; Petitioner's Exhibit 1).
3. Petitioner returned to full time work for the Postal Service in December 2009. At that time, OWCP no longer made payments to her and did not pay her health insurance

premiums, but the Postal Service did not begin withholdings from her salary to pay those

premiums. (Petition).

4. In March 2011, Petitioner called her human resources office and advised that

withholdings were not being made for her health insurance premiums. Soon after, Respondent began withholding health insurance premiums from her salary. (Petition).

5. Petitioner had FEHB coverage for the entire period from her return to work for the

Postal Service in December 2009 to when Respondent began premium withholdings in March

2011 (Petition).

6. On April 13, 2011, Respondent issued an invoice identifying a health benefit

premium-related debt of \$4,671.60 owed by Petitioner. The invoice broke down the claim by

pay period showing the biweekly premium that should have been withheld each pay period

from October 2009 through March 2011. The invoice provided, "Per SF 2809 your health

benefits changed from none to 105 in pp 23/2009." The invoice reflected premiums totaling

\$253.08 should have been collected for pay periods 23/2009 through 25/2009 (through

November 2009) and premiums totaling \$4,418.52 should have been collected for pay periods

26/2009 through 06/2011 (December 2009 through mid March 2011). (Petitioner's Exhibit 3).

7. Petitioner's postmaster issued her a letter of demand on April 13, 2011, and a

Notice of Involuntary Administrative Salary Offsets dated June 3, 2011, both seeking payment

of \$4,671.60 for unpaid health insurance premiums (Petitioner's Exhibits 3, 4; Respondent's

Exhibits 9, 10 (Declarations of C. Gonzales and N. Godinez)).

8. Petitioner filed a timely Petition for Hearing (Petition).

DECISION

Petitioner was enrolled in the FEHB Program from at least December 2009, and no

premiums were withheld from her pay until March 2011 (Findings 3-5). Regulations governing

the FEHB Program provide that part of the cost of an employee's health insurance is paid by

the employing agency and the remainder of the premium is paid by the employee through

payroll deductions each pay period. An employee is deemed to incur a debt to the United

States in any pay period during which enrollment in the FEHB Program continues but a

deduction for, or direct payment of, the employee's share of the premium is not made. 5 C.F.R. §§890.501, 890.502. Petitioner is liable to Respondent for the amount of unpaid health insurance premiums. See *Barry E. Guy*, P.S. Docket No. DCA 11-203 (September 21, 2011); *Diane Pierce*, P.S. Docket No. DCA 06-118 (October 17, 2006).

Respondent contends that the amount owed is \$4,671.60 as reflected on the invoice (Finding 6). The invoice recites that per a Standard Form 2809 Petitioner opted for coverage (and obtained coverage) under the Respondent-administered health benefits program in pay period 23/2009, which was in October 2009, but Respondent has not offered that form in evidence or offered other proof that Petitioner's coverage began in October 2009. Petitioner concedes she returned to work in December 2009, and I have so found (Finding 3). Respondent has not proved, and thus may not recover, premiums for October and November 2009. Respondent has proved unpaid premiums, which Petitioner does not contest, from pay period 26/2009 through 6/2011, amounting to \$4,418.52 (Finding 6).

Petitioner correctly points out that the failure of Respondent to withhold premiums from her salary was not her fault and that it was she who first notified Respondent of the error. However, lack of fault does not relieve an employee receiving a benefit from Respondent from the obligation to repay amounts Respondent failed to collect for the benefit. *Stephen R. Dean*, P.S. Docket No. DCA 09-168 (September 8, 2009); *Victor Buenrostro*, P.S. Docket No. DCA 08-25 (April 10, 2008).

Petitioner reported having "some hardship" managing on her current salary even without the withholdings Respondent proposed. My Order of July 27, 2011, directed Petitioner to the regulations describing the type of information required to demonstrate "severe financial hardship" that would allow me to reduce the amount of monthly withholdings proposed by Respondent by extending the repayment schedule (39 C.F.R. §961.4 (b)(8)). Petitioner did not respond to that Order, and I have no basis for reducing Respondent's proposed rate of withholding.

Accordingly, Respondent may collect \$4,418.52 by withholding from Petitioner's salary. The Petition is granted in part and denied in part.

Norman D. Menegat
Administrative Judge

October 21, 2011

In the Matter of a Mail Dispute Between

GARY & DIANA HICKS
and
MARK VAN DINTER

P.S. Docket No. MD 11-249

APPEARANCE FOR DISPUTANTS
GARY AND DIANA HICKS:
William W. Palmer, Esq.

APPEARANCE FOR DISPUTANT
MARK VAN DINTER:
Mark Van Dinter

INITIAL DECISION

This mail dispute has been docketed pursuant to Postal Operations Manual §616.21, under the procedures established at 39 C.F.R. Part 965 to resolve conflicting claims to receive mail. The disputants, former business associates, claim mail addressed to Revenue Recovery Services LLC, 43525 Ridge Park Drive, Temecula, CA 92590-3609. The Judicial Officer has ordered that the disputed mail be held by the Temecula Postmaster until this mail dispute is resolved.

Both disputants filed declarations, comments to the other's submissions, and documents. The following findings of fact are based on these submissions as well as documents the parties previously filed with the Temecula Post Office, which have been forwarded to this office.

FINDINGS OF FACT

1. Disputants Gary and Diana Hicks began operation of Revenue Recovery Services as a sole proprietorship in 2001. The Controller of the State of California takes possession of certain unclaimed financial assets, and Revenue Recovery Services helped the rightful owners recover their assets. (Declaration of Gary Hicks filed September 19, 2011 ("Hicks I"), ¶ 1; Opposition Declaration of Gary Hicks; see Investigative Agreement).

2. On September 30, 2010, Gary and Diana Hicks and disputants Mark and Paula Van

Dinter formed a limited liability company, Revenue Recovery Services LLC (the "LLC"), to operate in a building owned in part by Mr. Van Dinter at 43525 Ridge Park Drive in Temecula. The business of the LLC was to locate the rightful owners of unclaimed assets held by the Controller and submit claims on their behalf. The LLC received a commission paid directly by the Controller for each successful claim. (Hicks I, ¶ 9 and Exhibit D; Revenue Recovery Services LLC Operating Agreement (Attachment to Mark Van Dinter's September 26, 2011 declaration ("Van Dinter III"))).

3. The four members of the LLC had equal ownership shares of 25% each, and each was a director of the LLC. They agreed in the Operating Agreement that profits were to be divided 65% to Gary and Diana Hicks and 35% to Mark and Paula Van Dinter. (Operating Agreement).

4. In January 2011, the Hicks moved the business to their home at 32562 Campo Drive, Temecula. They continued to operate the business at that address, and Mr. Van Dinter no longer participated in the LLC's operation. On January 10, 2011, Diana Hicks filed a change of address order asking the Postal Service to forward LLC mail addressed to the Ridge Park Drive address to the Campo Drive address. (Van Dinter letter to Temecula Post Office ("Van Dinter I") and Exhibit 3).

5. Mr. Van Dinter's letter carrier advised him that the Postal Service would not recognize the forward order (Van Dinter I, Exhibit 4). For several months, Mr. Van Dinter delivered to the Hicks by hand any LLC mail received at 43525 Ridge Park Drive. (Van Dinter III; Hicks I, ¶¶ 7, 9; Van Dinter I, Exhibits 2, 4; August 25, 2011 declaration of Mark Van Dinter).

6. The LLC mail included commission payments from the Controller resulting from successful claims filed during the time the disputants operated the business together (Van Dinter I, Exhibit 8). Mr. Van Dinter expected the Hicks to send him 35% of the commissions, as provided by the Operating Agreement (Finding 3) (Van Dinter I and Exhibit 2).

7. In June 2011, Mr. Van Dinter became concerned because the Hicks were not

sending him any payments, and he stopped delivering the LLC mail he received to the Hicks

(Van Dinter I, Exhibit 7).

8. In July 2011, Gary Hicks met with the postmaster and asked that mail addressed to Revenue Recovery Services LLC at 43525 Ridge Park Drive be forwarded to his home at 32562 Campo Drive (Hicks I, ¶ 9). The postmaster decided to hold the mail in dispute, attempted to work out a resolution with the parties (July 25, 2011 letter to disputants), and failing that, forwarded the matter to the Judicial Officer. The Judicial Officer ordered that the mail addressed to Revenue Recovery Service at 43525 Ridge Park Drive be held pending [1] resolution of the dispute over its delivery.

DECISION

A primary objective of the rules used to resolve mail disputes is to assure that mail is delivered consistent with the intent of the senders. *William R. Cole and Richard Gillson*, P.S. Docket No. MD 97-272 (October 10, 1997). Those dealing with Revenue Recovery Services LLC, including the California Controller, intend that their mail be delivered to the business, which is now operated by Diana and Gary Hicks at the Campo Drive address. Under these circumstances, we decline Mr. Van Dinter's suggestion that the intent of the senders should be determined by the address to which they sent the mail. The LLC's mail should be delivered as directed by the operators of the business, Diana and Gary Hicks. *See Kevin R. Sheele and Frank Marco*, P.S. Docket No. MD 97-322 (October 28, 1997).

Mr. Van Dinter argues that the Hicks, being only two of the four members of the LLC, had no authority to file a change of address order redirecting the LLC's mail. However, the LLC's Operating Agreement provides, "Any Member may bind the Company in all matters in the ordinary course of business." However, there is no need under the circumstances of this mail dispute to divine the scope of authority granted under the Operating Agreement, because the decision herein is based on evidence that the senders of mail to the LLC intend that it be delivered to the business now operated by the Hicks on Campo Drive.

Both parties submitted as evidence various official government documents—e.g. City Business License, Secretary of State Statement of Information (LLC), Articles of Organization, etc.—showing the LLC's address. However, many of the forms reflect or are the result of self-

reporting, and they are not conclusive as to where the business is currently operating and where the mail should be delivered. The intent of the senders that their mail be delivered to the business is a more reliable basis for determining to whom the mail should be delivered. Mr. Van Dinter no longer participates in the operation of the LLC, at the Ridge Park Drive address or elsewhere (Finding 4). What he seeks in this proceeding is to require the Hicks to pay him the share of commissions to which he is entitled (Findings 3, 6, 7). This is not the forum to consider Mr. Van Dinter's allegations that the Hicks are not living up to their obligations under the LLC Operating Agreement. The Postal Service will comply with directions of a court regarding delivery of the mail. See Postal Operations Manual §616.3. Mail addressed to Revenue Recovery Services LLC at the disputed address should be delivered as directed by the business's operators, Diana and Gary Hicks. The Judicial Officer should issue an Order to the Temecula Post Office directing that mail addressed to Revenue Recovery Services LLC, 43525 Ridge Park Drive, Temecula, CA 92590-3609, be delivered as requested by Gary and Diana Hicks.

Norman D. Menegat
Administrative Judge

[1]

Documents submitted in this proceeding identify the business name as Revenue Recovery Services LLC. Neither party has claimed prejudice or confusion over the identification of the business in the Judicial Officer's August 15, 2011 Order as Revenue Recovery Service LLC and the slight variance in the name between the Order and the documents is harmless.

November 8, 2011

In the Matter of a Mail Dispute Between

CATHY LOTT GRANTHAM
and

RITA LOTT DELOACH
and
LINDA LOTT DOUGLAS

P.S. Docket No. MD 11-282

APPEARANCE FOR DISPUTANT
CATHY LOTT GRANTHAM:

APPEARANCE FOR DISPUTANT
RITA LOTT DELOACH

APPEARANCE FOR DISPUTANT
LINDA LOTT DOUGLAS:

INITIAL DECISION

The three disputants are sisters who cannot agree as to which of them should receive mail addressed to their deceased father. The mail in dispute is addressed to Johnnie Cecil Lott, individually or jointly with any of the named disputants, at 1383 County Road 93, McCarley, MS 38943-6697. The McCarley Postmaster has been directed to hold the disputed mail. I recommend that the Judicial Officer direct the postmaster to release the mail to Ms. DeLoach

FINDINGS OF FACT

1. Johnnie Cecil Lott died on August 27, 2011 (Exhibit 5). At the time of his death at age 88, Mr. Lott lived alone at 1383 County Road 93, McCauley, MS 38943-6697, the disputed address (C. Grantham Rebuttal Affidavit (Grantham Reply Aff.), attachment; Exhibit 8).

2. Mr. Lott had transferred the property at issue to Ms. Grantham by warranty deed subject to a life estate in his favor (Grantham Reply Aff., attachment). Ms. Grantham now owns the property in fee, and lives there part time. However, her permanent residence is over 100 miles away, where she is employed. (Grantham Rebuttal Aff. at pp. 1, 3; Affidavit of C. Grantham (Grantham Aff.) at pp. 2-3; Affidavit of R. DeLoach (DeLoach Aff.) ¶ 1 [1].

3. Mr. Lott executed a will, which so far as the record reveals, is uncontested. The three disputants are Mr. Lott's daughters, who are equal beneficiaries under that will. (Referral letter from Postal Service field counsel (Referral Letter); Exhibit 5). The will named Ms. DeLoach and Ms. Grantham as co-executors of Mr. Lott's estate (Exhibit 7).

4. Mr. Lott's wife, Dorothy Lott, is incompetent and resides in a nursing home (Referral Letter; Exhibits 1, 3). Mrs. Lott's affairs are handled by Mr. M. Adams, under a power of attorney. Mail addressed to Mrs. Lott, or jointly addressed to Mr. and Mrs. Lott at the disputed address, is forwarded as directed by Mr. Adams (Exhibits 1-2). Accordingly, mail jointly addressed to Mr. and Mrs. Lott is not here in dispute and should continue to be forwarded.

5. Ms. DeLoach has lived next door to her father's residence for over 25 years and interacted with him on a daily basis. Although Mr. Lott largely was self-sufficient until shortly before his death, Ms. DeLoach was his primary caregiver, and is most knowledgeable about his affairs (DeLoach Aff. ¶ 1-3; Statement of B. Heath; Statement of R. Banksston ; cf., Rebuttal Statement of L. Douglas (Douglas Rebuttal) at p. 2 (acknowledging Ms. DeLoach as Mr. Lott's primary caregiver but disputing that Ms. DeLoach possesses superior knowledge about Mr. Lott's affairs)). However, Ms. Grantham spoke with Mr. Lott every day by telephone (Grantham Rebuttal Aff. at p. 1).

6. The disputants provided conflicting requests to receive mail sent to the address in issue, if addressed to Mr. Lott individually, or to Mr. Lott jointly with one or more of the three disputants. On September 21, 2011, field counsel for the United States Postal Service forwarded this dispute to the Judicial Officer for resolution, and the case was docketed and assigned to the undersigned administrative judge. (*Notice of Docketing of Mail Dispute and Submittal Deadline*, September 26, 2011). All three parties submitted sworn statements, and the record closed on November 1 (see October 18, 2011 Order).^[3]

DECISION

Ms. Grantham argues that the held mail and future mail in dispute should be released jointly to the estate's co-executors, herself and Ms. DeLoach, or to any two of the daughters, presumably by appointment at the post office (Grantham Aff. at p. 3; Grantham Reply Aff. at p. 3). She also argues that mail addressed jointly to Mr. Lott and her should be released to her, and that mail addressed only to her at the disputed address be delivered as addressed (Grantham Rebuttal Aff. at p. 3). Ms. Grantham also argues that she is more sophisticated in business matters and better educated than Ms. DeLoach, and therefore is better suited to handle her father's affairs, which requires her to receive the mail. She suggests that Ms. DeLoach is untrustworthy as is the evidence Ms. DeLoach presented. (Grantham Rebuttal Aff. at pp. 1-3).

Ms. DeLoach argues that her sisters are uncooperative. To ensure that the estate's affairs are handled properly, she contends that the mail should be delivered as she directs because she is most knowledgeable about and in the best position to handle the estate's affairs. (DeLoach Aff. ¶¶ 2-4, 6).

Ms. Douglas does not seek the disputed mail, except for mail addressed jointly to her and Mr. Lott (Affidavit of L. Douglas). Ms. Douglas argues that the disputed mail should be released to the three sisters together at the post office under the supervision of a fourth person who would hand the mail physically to the appropriate recipient and who would open certain mail to be redirected (Douglas Rebuttal at p. 2). Otherwise, Ms. Douglas generally supports the position of Ms. Grantham (Douglas Rebuttal at pp. 1-3).

The usual rules that guide resolution of mail disputes such as the one before me are unhelpful. Ordinarily, the Postal Service should deliver mail addressed to a deceased person as addressed, allowing someone who would normally receive the deceased's mail at that address to receive such mail. Postal Operations Manual § 612.41. However, none of the disputants lived at the address used by the deceased at the time of his death (Finding 1). See *Leonard H. Mayer, Jr. and Pearl H. Mayer*, P.S. Docket No. MD 97-352 (I.D. November 14, 1997), *finalized*, (Order December 9, 1997).

While Ms. Grantham now resides part time at this address, which is over 100 miles from her permanent residence (Finding 2), she does not represent that she lived at her father's residence before his death. Ms. DeLoach similarly does not represent that she lived there (though she lived next door) but she attests that she frequently picked up the mail at the disputed address while her father was alive (DeLoach Aff. at ¶ 5). The evidence is insufficiently developed for me to be able to determine that either disputant would normally receive the deceased addressee's mail at the address at which he had lived, within the meaning of the regulation. I do not believe that section 612.41 applies to this situation.

Alternatively, postal rules provide that mail addressed to a deceased person may be forwarded to a different address based on a request of an executor. Postal Operations Manual § 612.42. Accordingly, were a single executor of the estate appointed, I would recommend that the Judicial Officer order release of the mail as directed by that person. See *Victoria Ann Bunney and Norman Gilbert, Jr.*, P.S. Docket No. MD 10-351 (I.D. January 20, 2011), *finalized*, (Order March 8, 2011). However, Ms. Grantham and Ms. DeLoach are co-executors, and Mr. [4] Lott's will does not assign priority between them (Finding 3).

Where co-executors are appointed, mail dispute decisions reflect that the executor that is currently handling the deceased's affairs may direct delivery of the mail. See *Shelby W. Reed and Bonnie Simms*, P.S. Docket No. MD 07-99 (I.D. May 10, 2007), *finalized*, (Order June 11, 2007). However, both Ms. Grantham and Ms. DeLoach appear to be engaged in handling the deceased's affairs, and both claim a superior ability to do so.

As for Ms. Douglas, she is not an executor and presently does not seek delivery of the

disputed mail. I reject Ms. Douglas' request that the mail be released to the three sisters together under the supervision of an unidentified fourth person at the post office. Where persons making conflicting orders for delivery of the same mail are unable to agree which should receive the mail, postal rules provide that the mail may be delivered to a third party so long as that person is unanimously agreed to by the disputing parties. Postal Operations Manual § 616.1. Where, as here, the parties cannot agree on such a third party receiver of the mail and persist with a mail dispute without agreement, I lack authority to impose such a resolution. See *Jay Enterprises of NC, Inc. and Wendy Blanks*, P.S. Docket No. MD 10-57 [5] (I.D. April 23, 2010), *aff'd*, (P.S.D. June 14, 2010).

On this record, the only apparent material distinction between the uncooperative co-executors, Ms. Grantham and Ms. DeLoach, is that Ms. DeLoach lived next door to her father, was his primary caregiver, engaged him personally on a daily basis, and is most knowledgeable about his affairs (Finding 6). While this distinction is not a particularly satisfying basis on which to resolve this dispute, as the only material distinction apparent to me from the record, I find that Ms. DeLoach possesses a superior right to direct delivery of the disputed mail.

It is not clear from the record however, whether Ms. DeLoach has filed a forwarding request, or alternatively, whether her expectation is to pick up the mail at the disputed address (where Ms. Grantham resides part time). I will not countenance an unseemly race to the mailbox. Accordingly, Ms. DeLoach is advised that she may not simply retrieve all mail from her father's address as apparently she has done at times in the past (DeLoach Aff. at ¶ 5). Rather, she must instruct the postmaster as to how the disputed mail, here resolved in her favor, should be re-directed. Furthermore, Ms. DeLoach is cautioned that this mail dispute only determines that she may direct delivery of the disputed mail, not that she owns any such mail. If mail should be re-directed to Ms. Grantham or Ms. Douglas, Ms. DeLoach must do so. Furthermore, if the parties work out their differences (as obviously they should), they should so inform the postmaster. If this matter finds itself in court, postal regulations require that the mail will be delivered as directed by a court order. Postal Operations Manual § 616.3.

Furthermore, if mail for the address in question is addressed to Ms. Grantham alone, it is not subject to the mail hold order. Such mail should be delivered as addressed.

I recommend that the Judicial Officer issue an order to the McCarley Postmaster to release held mail and to deliver future mail addressed to 1383 County Road 93, McCarley, MS 38943-6697, as follows:

If addressed to Mr. Lott, individually or jointly with one or more of Ms. Grantham, Ms. DeLoach or Ms. Douglas, deliver as directed by Ms. DeLoach;

If addressed solely to Ms. Grantham, deliver as addressed.

Gary E. Shapiro
Administrative Judge

- [1] Ms. DeLoach submitted an unsworn statement on October 6, 2011, and later submitted the statement as a sworn affidavit, on October 24, 2011.
- [2] I assign less weight to the unsworn statements by Mr. Heath and Mr. Bankston, as well as one by Ms. DeLoach's daughter. However, without more persuasive reasons to do so, I do not disregard them as completely unreliable as Ms. Grantham asks.
- [3] Ms. Grantham's addendum to her rebuttal affidavit was received November 1, and has been considered.
- [4] I reject Ms. Grantham's argument that Mr. Lott's appointment of her to share access to his safe deposit box reflects his judgment that she was the more trustworthy executor for purposes of handling his estate (Grantham Rebuttal Aff. at p. 3). Mr. Lott's appointment of the sisters as co-executors must control although, unfortunately, in retrospect that appointment appears to be harmful to the settling of his affairs due to the uncooperative nature of those co-executors.
- [5] Ms. Douglas also suggests that mail addressed to Mr. Lott and to her with an indication of right of survivorship sent to the disputed address, should be delivered as she directs. However, jointly addressed mail is delivered as addressed only if one of the addressees can receive it there. Postal Operations Manual § 613.1. I decline the invitation to require the postmaster to review continually the mail further for additional re-distributions, here potentially to five or more different addressees, which in any event, would not resolve mail addressed to Mr. Lott and more than one of his daughters.

November 9, 2011

In the Matter of a Mail Dispute Between

LUCIANO BONANNI

and

ALLAN HAUSKNECHT, M.D.

P.S. Docket No. MD 11-279

APPEARANCE FOR DISPUTANT

LUCIANO BONANNI:

Luciano Bonanni

APPEARANCE FOR DISPUTANT

ALLAN HAUSKNECHT, M.D.:

Marci S. Zinn, Esq.

Jaspan Schlesinger, LLP

INITIAL DECISION

The disputants contest mail addressed to MRI Enterprises, LLC, at 8 Melton Drive West, Rockville Centre, NY 11570-3257 (the Rockville Centre address). Disputant Allan Hausknecht asks that a change of address request that he submitted be honored such that the mail should be delivered to the offices of MRI Enterprises, LLC, at 2689 Pitkin Avenue, Brooklyn, NY 11208-2704 (the Brooklyn address), or to its post office box. Disputant Luciano Bonanni opposes the change of address request and seeks to have the mail delivered as addressed. The Judicial Officer has directed the Rockville Centre Postmaster to hold the mail pending resolution of this mail dispute. I recommend that the Judicial Officer direct the postmaster to release the mail and deliver future mail addressed to MRI Enterprises, LLC to the Brooklyn address or as otherwise directed by Dr. Hausknecht. [1]

FINDINGS OF FACT

1. MRI Enterprises, LLC (MRI) is a limited liability company formed in 2001 under New York law. MRI operates magnetic resonance imaging facilities in New York hospitals. (Hausknecht Aff. ¶ 3; Bonanni Aff. ¶ 1; Bonanni Aff. Ex. A).

2. In 2004, MRI's operating agreement was amended and restated, replacing the

2001 operating agreement. As reflected in the 2004 operating agreement which remains in effect, MRI is owned as follows:

40% by Horizons Investors Corp., owned by Mr. B. Fernandez
 20% by Dr. Hausknecht, as an individual
 20% by Adex Management Corp., owned by Mr. S. Kalish
 20% by MRI Enterprises, Inc., owned by Mr. Bonanni.

(Hausknecht Aff. Exs. D, E; Bonanni Aff. ¶¶ 1, 4; Hausknecht Aff. ¶¶ 2, 9; Zinn Aff. ¶ 20).

3. The 2004 operating agreement identifies MRI's place of business as 110

Marcus Drive, Melville, NY 11747, which was the address of MRI, Inc., a 20% owner of MRI

(Hausknecht Aff. Ex. E; Bonanni Aff. ¶ 5). Neither party maintains that this originally-identified

address is current for MRI.

4. The 2004 operating agreement requires a 2/3 super-majority vote of its

members (by percentage of ownership) for certain enumerated actions, while all other actions

require a simple majority vote of members (also by percentage of ownership). (Hausknecht

Aff. Ex. E; Bonanni Aff. ¶ 6; Hausknecht Aff. ¶¶ 26-29; Hausknecht Opp. ¶ 9).

5. Section 2.3 of the 2004 operating agreement identifies the purpose of MRI as

being ownership and operation of magnetic resonance imaging facilities, and related functions

(Hausknecht Aff. Ex. E).

6. Section 2.4 of the 2004 operating agreement identifies MRI's "principal place of

business" as the original Melville address (Finding 3). The same section provides that this

principal place of business "shall be located at such place as the members may mutually agree

upon from time to time." (Hausknecht Aff. Ex. E).

7. Section 2.6 of the 2004 operating agreement identifies the Secretary of State of

New York as MRI's agent for service of process, and provides that the address to which the

Secretary of State is to mail process to MRI is established in the articles of incorporation.

Section 2.6 concludes, "The members may change such address from time to time by their

mutual agreement and in accordance with applicable provisions of law." (Hausknecht Aff. Ex.

E).

8. Section 4.3 of the 2004 operating agreement provides that a simple majority of

MRI's members (by percentage of ownership) constitutes a quorum and, that at any meeting with a quorum, a simple majority vote is binding unless a 2/3 super-majority is required by the operating agreement or otherwise is required by law. Section 4.5 allows any action that may have been taken at a meeting of members to be established by written consent without meeting or prior notice. Accordingly, a simple majority of members' voting interests may bind MRI by such a consent agreement so long as a super-majority vote is not required. (Hausknecht Aff. Ex. E).

9. Section 4.8 of the 2004 operating agreement generally identifies the actions for which a super-majority vote is required. One such action, at section 4.8(o), is for the "alteration of the authorized business of [MRI], as set forth in Section 2.7." However, the operating agreement does not include a section 2.7, and the authorized business is established in section 2.3, as referenced in Finding 5. (Hausknecht Aff. Ex. E; Bonanni Aff. ¶ 7; Hausknecht Opp. ¶ 9). None of the enumerated items in section 4.8 mention changing MRI's address (Hausknecht Aff. Ex. E).

10. In 2005, a resolution and consent agreement (the 2005 agreement) was executed for MRI. The 2005 agreement identifies the disputed Brooklyn address as MRI's principal office and requires its books and records to be maintained there. (Hausknecht Aff. Ex. F; Hausknecht Opp. ¶ 5; Hausknecht Aff. ¶ 10; Bonanni Aff. ¶ 9). Thereafter, MRI's principal office has been the Brooklyn address (Hausknecht Aff. ¶ 11).

11. The 2005 agreement was signed by Dr. Hausknecht, Mr. Fernandez (on behalf of Horizons), and Mr. Kalish (on behalf of Adex), but not by Mr. Bonanni. The members signing the 2005 agreement cumulatively represented 80% (a super-majority) of MRI's ownership (Hausknecht Aff. Ex. F; Hausknecht Opp. ¶ 6; Bonanni Aff. ¶ 9).

12. The 2005 agreement appointed Horizons and Adex as MRI's managers, with Adex providing MRI's day-to-day management. The address identified for Adex is the contested Rockville Centre address. The 2005 agreement also authorized Adex to designate Mr. Kalish as MRI's chief operating officer, and authorized Horizons to designate Mr. Fernandez as MRI's chief executive officer. (Hausknecht Aff. Ex. F). These titles – chief

operating officer and chief executive officer – do not appear in the 2004 operating

agreement, nor does the title "president" (Hausknecht Aff. Ex. E).

13. Also in 2005, Mr. Bonanni and MRI, Inc., filed litigation against Horizons, Mr.

Fernandez, Adex, Mr. Kalish and Dr. Hausknecht in state court, in Suffolk County (Bonanni Aff.

¶ 8; Bonanni Aff. Ex. C). The current status of that case is not in the record.

14. In April 2011, another consent agreement (the 2011 agreement) was executed

for MRI. The 2011 agreement includes the following resolution:

RESOLVED, that the address for [MRI] is hereby changed from 8 Melton Drive West,
Rockville Centre, New York 11570 and/or c/o Solomon Kalish, to: 2689 Pitkin Avenue,
Brooklyn, New York 11208 and/or P.O. Box 80221, Brooklyn, New York 11208-0221[.]

It also included related resolutions authorizing MRI's members to inform appropriate entities

about the address change. (Hausknecht Aff. Ex. G; Hausknecht Aff. ¶¶ 13-14).

15. The 2011 agreement was signed by Dr. Hausknecht as 20% owner of MRI, and

by Mr. Fernandez, as president (and owner) of Horizons and 40% owner of MRI. The signers

of the 2011 agreement therefore cumulatively represented 60% of MRI's ownership, a majority

but not a super-majority of ownership (Hausknecht Aff. Ex. G; Hausknecht Aff. ¶ 5). The

reason for the 2011 agreement asserted by its signatories was that Mr. Kalish had been

indicted on federal criminal charges. As a result, for appearances as well as other reasons,

MRI wished to change its mailing address from that of Mr. Kalish, to the Brooklyn address,

which is MRI's principal office. (Hausknecht Aff. ¶¶ 4, 11, 15-16, 38; Fernandez Opp. ¶ 5;

Hausknecht Opp. ¶ 15; see also Bonanni Opp. ¶ 4).

16. A print-out from the website of the New York Department of State, Division of

Corporations identifies Mr. Kalish at the Rockville Centre address as the "address to which the

[Department of State] will mail process if accepted on behalf of the entity." (Bonanni Aff. Ex. D;

Bonanni Aff. ¶ 10).

17. Litigation between and among MRI's owners has been ongoing in at least two

New York state courts. In May 2011, the Supreme Court of New York, in Nassau County,

[2]

issued an 11-page order denying a motion for a preliminary injunction. The preliminary

injunction motion denied by the court, among other things sought to establish the Rockville

Centre address as MRI's mailing address, and sought to enjoin Dr. Hausknecht and others from changing that address. In denying the motion, the court described the litigation as being in a "nascent state." The record does not reflect further proceedings in that case.

(Hausknecht Aff. Ex. K (quote at p. 11); Hausknecht Aff. ¶¶ 7, 17, 20; Hausknecht Opp. ¶¶ 12-14; Bonanni Ex. C; Bonanni Aff. ¶¶ 8, 11; Bonanni Opp. ¶ 2).

18. Dr. Hausknecht, identifying himself as managing member of MRI, filed a forwarding request with the Rockville Centre Postmaster for mail addressed to MRI at the Rockville Centre address to be re-directed to the Brooklyn address or to P.O. Box 80221, Brooklyn, New York 11208 (Hausknecht Aff. Ex. A). Mr. Bonanni, as president of MRI, Inc., and 20% owner of MRI, and Mr. Kalish as president of Adex and 20% owner of MRI, filed an opposition letter with the postmaster. The letter contested the forwarding request as unauthorized because it lacked required super-majority support. The opposition letter also identified the Rockville Centre address as Mr. Kalish's current address, and asked the postmaster to leave the address for delivery of MRI's mail unchanged. (Hausknecht Aff. Ex. B; Bonanni Aff. ¶ 13).

19. Field counsel for the United States Postal Service forwarded the resulting mail dispute to the Judicial Officer for resolution under Postal Operations Manual § 616.21

[3]
(Hausknecht Ex. C). The case was docketed and assigned to the undersigned administrative judge (*Notice of Docketing of Mail Dispute and Submittal Deadline*, September 22, 2011), and is being adjudicated under the procedures established at 39 CFR Part 965. Both parties submitted sworn statements, supporting documents, and opposition statements.

DECISION

Arguments of the parties.

The parties present numerous arguments. Preliminarily, Dr. Hausknecht argues that I should not reach the merits of this dispute because res judicata, waiver/estoppel and lack of standing preclude Mr. Bonanni from contesting the change of address request. Specifically, Dr. Hausknecht argues that the state court order denying a preliminary injunction request referenced at Finding 17, is entitled to res judicata preclusive effect. He further argues that Mr.

Bonanni's pursuit of relief concerning MRI's mailing address in that court precludes him from contesting the change of address order in this mail dispute. Dr. Hausknecht also argues that Mr. Bonanni, in contrast with his company, Horizons, is not a proper party and therefore lacks standing. He asks that I defer to the state court litigation and not rule in the mail dispute before me.

On the merits, Dr. Hausknecht argues that both the 2005 agreement and the 2011 agreement establish the Brooklyn address as the appropriate address for delivery of MRI's mail. More specifically, he maintains that the 2004 operating agreement requires only a simple majority vote rather than a super-majority of owners to authorize a change of address, and that therefore the 2011 agreement properly constituted an official change of address for MRI. Alternatively, Dr. Hausknecht argues that even if I were to accept Mr. Bonanni's position that a super-majority is necessary, the 2005 agreement which was signed by a super-majority, constitutes an effective change of address.

Mr. Bonanni argues that the state court's order required the parties to maintain the status quo regarding documents and addresses. He maintains that unless one of the state courts directs the Postal Service to the contrary, the current address (the Rockville Centre address) must be used for mail delivery. Mr. Bonanni argues that while the 2005 agreement required books and records to be maintained at the Brooklyn address, it did not require the mail to be delivered there. Mr. Bonanni asserts that the 2011 agreement should be disregarded because it was not signed by a super-majority of MRI owners which he contends is required by the 2004 operating agreement in order to change MRI's address. The parties also make a variety of additional arguments that I deem not to be material to this decision unless otherwise indicated.

Preliminary Issues.

I reject both parties' preliminary arguments. Application of res judicata requires among other elements, a final adjudication on the merits. See, e.g., *Allen v. McCurry*, 449 U.S. 90, 93 (1980). The state court's order denying a motion for a preliminary injunction and describing the litigation as being in a nascent state (Finding 17), is not a final adjudication on the merits.

Accordingly, the state court order does not carry res judicata effect, nor do I credit the argument that Mr. Bonanni has waived his ability to contest the change of address request in this proceeding or is estopped from doing so. Dr. Hausknecht initiated the change of address request here at issue. Mr. Bonanni, with an ownership interest in MRI through MRI, Inc. (Finding 2), opposed that request creating this mail dispute and possesses standing. He is free to defend his position in this case.

Mr. Bonanni's preliminary argument that the court order precludes a change of address is similarly rejected. The order does nothing of the sort. (Finding 17). [4] While postal regulations require that mail will be delivered as directed by a court order, Postal Operations Manual § 616.3, no such court order directing delivery of mail is in the record or has been identified. Furthermore, I will not suspend this case for an indefinite period until the matter might be resolved by a court. As I ruled in *Mark Lebeau and John Jurkowski*, P.S. Docket No. MD 10-35 (I.D. April 13, 2010):

In the absence of an agreement by the parties to suspend action on the mail dispute, it is not appropriate for me to decline to make a decision, and it is my responsibility to decide this matter resolving the appropriate delivery of the disputed mail until such time as a court decision is issued.

The Merits.

Ordinarily, postal rules require that mail sent to a business organization such as an LLC will be delivered according to the directions of the organization's president or equivalent official. Postal Operations Manual § 614.1. Mr. Bonanni does not claim to be MRI's president or equivalent official, and the term does not appear in the 2004 operating agreement (Finding 12). The record remains unclear, and is insufficient to allow me to determine who presently might be considered as the equivalent official to president of MRI. Neither party effectively argues the issue, and careful examination of the sworn statements here submitted does not reveal identification of MRI's current manager. [5] In any event, if the 2011 agreement is enforceable, it would overcome any such presidential authority to change MRI's address. See *Rev. Ernest Nash Jr. and Mary Prewitt*, P.S. Docket No. MD 11-153 (I.D. July 29, 2011).

On the merits though, this case is more easily resolved than the parties' presentations

might suggest. Initially, I agree with Mr. Bonanni that the 2005 agreement does not

control the result. It is plain that until the 2011 agreement, all parties believed that MRI's

appropriate mailing address was the Rockville Centre address. Mr. Bonanni certainly

continues to believe that the Rockville Centre address remains the proper one for MRI. As for Dr. Hausknecht, despite protestations to the contrary, his signature on the 2011 agreement

belies his alternative position that the 2005 agreement remains decisive.

The 2011 agreement is crystal clear in stating that MRI's address was the Rockville

Centre address at that time (Finding 14). The entire purpose of the 2011 agreement was to

change that address from Rockville Centre to Brooklyn. (Findings 14-15). I find that the

parties to this mail dispute acknowledged MRI's address to be in Rockville Centre up until

execution of the 2011 agreement. Therefore, I need only resolve whether, for purposes of this

mail dispute, the 2011 agreement is enforceable based on a majority vote, or unenforceable

because it lacks a super-majority. I find that it is enforceable.

MRI can be bound by a simple majority vote via a consent agreement, without notice or

a meeting, see N.Y. Limited Liability Company Law § 407 (1994), so long as the action voted

upon is not one of the actions enumerated in the operating agreement as requiring a 2/3

supermajority (Findings 4, 8-9). It is uncontested that the 2011 agreement was passed by a

simple majority vote (Findings 14-15).

Mr. Bonanni argues that the operating agreement's section 4.8(o), requiring a super-

majority for the "alteration of the authorized business of [MRI], as set forth in Section 2.7"

includes changing MRI's business and mailing address. Initially, I note that the operating

agreement does not include a section 2.7 (Finding 9). The authorized business of MRI set

forth in section 2.3, identifies the purpose of MRI as being ownership and operation of

magnetic resonance imaging facilities, without mention of MRI's address (Findings 5, 9). I

agree with Dr. Hausknecht's argument that changing MRI's address does not affect its basic

authority to function.

Rather, changing MRI's address is mentioned with specificity in two places in the 2004

operating agreement – sections 2.4 and 2.6 (Findings 6-7). Section 2.4 identifies a specific

address for MRI's "principal place of business," which as both parties acknowledge was changed since the 2004 operating agreement became effective (Findings 6, 14). The same section also recites that this place of business may be located "at such place as the members may mutually agree upon from time to time." (Finding 6). There is no mention of a super-majority to change that location.

The other potentially relevant reference to an address for MRI is section 2.6. This section identifies the Secretary of State of New York as MRI's agent for service of process, and provides that the address to which the Secretary of State is to mail process to MRI is established in the articles of incorporation. Section 2.6 concludes "The members may change such address from time to time by their mutual agreement and in accordance with applicable provisions of law." (Finding 7). Again, there is no mention of a super-majority requirement to change that location.

I find these sections of the 2004 operating agreement specifically mentioning an address for MRI without reciting a need for a super-majority vote to change that address to be persuasive. Further, following careful examination of the enumerated list of actions that do require a super-majority, I find that changing the mailing address is not among them. Accordingly, changing MRI's address may be accomplished by a simple majority vote of owners, which was done in the 2011 agreement. (Finding 14).

While I have considered all arguments presented by the parties, Mr. Bonanni offers two other positions that deserve specific attention in this decision. He alleges that a change of address card presented by Dr. Hausknecht to the Rockville Centre Postmaster (Attachment A to Postal Service field counsel's referral) included an unauthorized stamped signature of Mr. Kalish (Bonanni Aff. ¶ 12). While support for this allegation might be inferred from Mr. Kalish's opposition to the change of address request (Finding 18), the record does not include specific evidence concerning this issue, nor any statement at all from Mr. Kalish (other than his submission to the state court). In any event, it is clear that this mail dispute is properly before me, as Dr. Hausknecht who maintains an ownership interest in MRI, requested the address change, and a letter by Mr. Bonanni and Mr. Kalish, also with ownership interests in MRI,

opposed it. (Finding 18). I therefore need not resolve the allegation that Mr. Kalish's signature on a change of address form was unauthorized.

[6]

Mr. Bonanni also mentions that a print-out from the website of the New York State Division of Corporations supports his position. However, that print-out only applies to service of process, and does not identify Mr. Bonanni as the recipient (Findings 7, 16). The address for the recipient of process from the state authorities may be different from an LLC's regular business mailing address. See N.Y. Limited Liability Company Law §§ 301-A(a)(3); 302(d)(4) (1999). Further, the consequences of MRI's obligation, if any, to change its registered address for process are not before me, and identification of the registered address may have been overcome by events, namely the 2011 agreement which I have found to be enforceable. The print-out from the website of the Division of Corporations, though somewhat supportive of Mr. Bonanni's position, is not sufficient to overcome the weight of the evidence to the contrary. Given the continuing legal disputes involving these parties, I must emphasize that this decision deals only with the delivery of mail not its ownership.

This initial decision recommends that the Judicial Officer should issue an order directing the Rockville Centre Postmaster to forward all held mail and to deliver future mail addressed to MRI Enterprises, LLC, at 8 Melton Drive West, Rockville Centre, NY 11570-3257, to 2689 Pitkin Avenue, Brooklyn, NY 11208-2704, or as otherwise directed by Dr. Hausknecht.

Gary E. Shapiro
Administrative Judge

[1]

The record consists of six affidavits, exhibits thereto, and an affirmation, and will be cited in this decision with the following conventions:

- Affidavit by Dr. Hausknecht, October 12, 2011 (Hausknecht Aff.)
- Affidavit by Mr. Fernandez, October 11, 2011 (Fernandez Aff.)
- Affirmation by Attorney Zinn, October 12, 2011 (Zinn Aff.)
- Affidavit by Mr. Bonanni, October 6, 2011 (Bonanni Aff.)
- Opposition Affidavit by Dr. Hausknecht, October 26, 2011 (Hausknecht Opp.)
- Opposition Affidavit by Mr. Fernandez, October 26, 2011 (Fernandez Opp.)
- Opposition Affidavit by Mr. Bonanni, October 26, 2011 (Bonanni Opp.)

Exhibits attached to these sworn statements are abbreviated as Ex. In addition, Horizons Investors Corp. will be referred to as Horizons; Adex Management Corp. will be referred to as Adex; and MRI Enterprises, Inc. (as contrasted with MRI Enterprises, LLC whose mail is here in dispute and which is abbreviated herein as MRI), will

be referred to as MRI, Inc.

[2]

Plaintiffs in that suit, which is different from the litigation referenced at Finding 13, include Mr. Kalish and Adex. Defendants include Dr. Hausknecht, Mr. Fernandez, and Horizons.

[3]

The referral incorrectly identified Mr. Bonanni as president of MRI rather than as president of MRI, Inc., which owns 20% of MRI (Hausknecht Aff. Ex. C; Zinn Aff. ¶¶ 12-17; Hausknecht Aff. ¶¶ 5, 35-36).

[4]

The same state court also issued a temporary restraining order which required the parties to maintain and preserve all documents, including those stored at the Rockville Centre address. (Bonanni Aff. Ex. F). That order does not involve MRI's mailing address either.

[5]

At one point, Mr. Kalish, who is not a party and has not participated in this mail dispute, may have been its president-equivalent (see Hausknecht Aff. Ex. H). However, the state Supreme Court order states that Mr. Kalish was "removed" from MRI in March 2011 (Hausknecht Aff. Ex. K at pp. 3-4). The court order also states that Mr. Bonanni was "removed" from MRI in 2005 (*id.*, at p. 4). At another point, Mr. Fernandez was identified as MRI's chief executive officer, a title not found in the 2004 operating agreement (Finding 12). To add further confusion, while the sworn statements do not explain who might be a "manager" of MRI currently under New York law, Dr. Hausknecht's letter identifies himself as MRI's managing member (Finding 18), without explanation.

[6]

Of course, were it demonstrated that Dr. Hausknecht falsely represented that Mr. Kalish signed that forwarding card, an issue on which I make no finding, Dr. Hausknecht's credibility could be impeached. However, as this mail dispute turns on the legal issue concerning the enforceability of the 2011 agreement, the import of such a credibility determination is greatly if not completely diminished, and I need not reach it. Mr. Bonanni also argues that retention of counsel by MRI requires a super-majority and was here violated (Bonanni Opp. ¶ 1). While the 2004 operating agreement indeed requires a super-majority to retain counsel (see Hausknecht Aff. Ex. E, section 4.8(m)), the record is silent concerning the circumstances surrounding the retention of counsel, and Dr. Hausknecht rather than MRI is the disputant in this case. In any event, this issue is not before me for decision.

November 9, 2011

In the Matter of the Petition by

MAXINE J. TALLEY

at

Chicago, IL

P.S. Docket No. DCA 11-250

APPEARANCE FOR PETITIONER:

Maxine J. Talley

APPEARANCE FOR RESPONDENT:

Kofi Owusu-Ansah

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Maxine Talley, filed a Petition for Hearing on August 10, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$2,050. On September 1, 2011, the undersigned received an Answer from Respondent in the above captioned Debt Collection Act case. In that document, Respondent reported that the Notice of Involuntary Administrative Salary Offsets issued on August 5, 2011, "has been rescinded."

On September 2, 2011, I issued an *Order to Show Cause* in which I stated that "[i]t appears that Respondent does not intend to pursue collection of this debt." Accordingly, in that Order I stated my intention to issue a Decision in favor of Petitioner unless I received a written objection from Respondent not later than September 19, 2011. No written objection has been filed to date.

On October 25, 2011, I received additional information from Petitioner which appears to be another Notice of Involuntary Administrative Salary Offsets dated October 6, 2011, for the same debt amount, notwithstanding my *Order to Show Cause* dated September 2, 2011. I instructed my staff to schedule a telephone conference with both parties to discuss the most recent information, and to determine how Respondent intended to proceed with this debt. Since that time, Respondent's representative, Mr. Owusu-Ansah, has failed to respond to repeated attempts to reach him by telephone and electronic mail.

As Respondent failed to respond to the *Order to Show Cause* in a timely manner, and as Respondent's representative has also failed to respond to repeated attempts by this office to contact him to discuss the issuance of the second Notice of Involuntary Administrative Salary Offsets, Respondent is in default in this case.

Accordingly, Petitioner is entitled to judgment in her favor.

DECISION AND ORDER

The Petition is GRANTED. Respondent may not collect the debt of \$2,050 by administrative offset

from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

December 2, 2011

In the Matter of the Petition by

FLORA D. YOUNG

at

Middletown, PA

P.S. Docket No. DCA 11-180

APPEARANCE FOR PETITIONER:

Flora D. Young

APPEARANCE FOR RESPONDENT:

Lyle V. Gaines

Manager, Labor Relations

United States Postal Service

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Flora Young, filed a Petition for Hearing on June 7, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$4,773.89 based upon payment of continuation of pay benefits. A hearing was conducted on September 1, 2011, in Harrisburg, Pennsylvania. [1] The following findings are based upon the record.

FINDINGS OF FACT

1. On September 7, 2006, Petitioner suffered an injury while employed by Respondent (Petitioner's Exh 8). [2]
2. Petitioner filed a claim for workers' compensation benefits (OWCP Claim No. 032152125) for that injury (Respondent's Exh. 1). [3]
3. Petitioner's claim was eventually denied by the Office of Workers' Compensation Programs (OWCP) for the United States Department of Labor (*Id.*)
4. Between September 15, 2006, and October 25, 2006, Respondent paid to Petitioner continuation of pay benefits totaling \$4,773.89 (Tr., pp. 35-38; Respondent's Exhs. 7 and 10).

5. Following the denial of Petitioner's original Claim No. 032152125, Petitioner filed a new claim for workers' compensation benefits for the same injury (OWCP Claim No. 032062818) (Respondent's Exhs. 23 and 24).

6. On December 27, 2007, Petitioner's second claim (OWCP Claim No. 032062818) was approved (Petitioner's Exh. 8).

7. On December 27, 2007, Petitioner was informed by OWCP that she was ineligible for continuation of pay benefits for the approved claim because the claim was filed beyond thirty (30) days from the date of injury (Respondent's Exh. 5).

8. OWCP approved workers' compensation payments to Petitioner retroactively to September 8, 2006, and Petitioner received those payments (Tr., pp. 34-35; Respondent's Exh. 7).

9. Petitioner was served with a Notice of Involuntary Administrative Salary Offsets dated May 18, 2011 (Petition Attachment).

10. The Debt Collection Act Petition was timely filed.

DECISION

Under the Debt Collection Act, the initial burden lies with Respondent to establish that a debt exists for which Petitioner is liable. *Victoria Bingham*, P.S. Docket No. DCA 09-177 (December 7, 2009). In accordance with the Federal Employees Compensation Act, 5 U.S.C. §8101, *et seq.*, Respondent paid to Petitioner continuation of pay (COP) benefits after filing of her original workers' compensation claim. 20 C.F.R. §10.200. The total of those payments was \$4,773.89 (Finding 4). Respondent argues that after denial of Petitioner's original workers' compensation claim, it was entitled to collect from Petitioner the COP payments made to Petitioner for that claim.

After denial of a workers' compensation claim by OWCP, Respondent is entitled to collect any COP payments made to Petitioner. *See generally, Natalie A. Martinez*, P.S. Docket No. DCA 03-159 (July 30, 2003)(after denial by OWCP, it is "conclusively presumed that Petitioner was not entitled to retain the continuation-of-pay benefits she received.") Thus Respondent met its initial burden in this case.

Petitioner contends that she was entitled to the COP payments because the claim that was originally denied was eventually approved by OWCP. However, an approved claim for COP benefits is limited to a timely filed workers' compensation claim (Respondent's Exh. 5; Finding 7). A claim is timely when filed within thirty (30) days after the date of injury. 20 C.F.R. §10.210. OWCP claims filed after the thirty (30) day period following the injury may be approved by OWCP but such claims are not entitled to COP payments. 20 C.F.R. §10.210(a).

In this case, after denial of her original OWCP claim in January 2007, Petitioner filed a second separate claim for the same injury many months after the thirty (30) day period

[4] following her injury. As Petitioner contends, the new claim eventually succeeded (Finding 7). However, regardless of the eventual success of that second claim, the second claim was filed beyond the thirty (30) day regulatory deadline required for receipt of COP payments.

[5] Thus, Petitioner was not entitled to collect COP payments for the period in question. The parties agree that the amount of COP payments Petitioner received (\$4,773.89) should be reduced by the amount set forth in Petitioner's Exhibit 12 to which Petitioner is entitled to credit (\$296.26). The balance due Respondent is \$4,477.63.

ORDER

The Petition is DENIED. Respondent may collect the debt of \$4,477.63 by administrative salary offset.

James G. Gilbert
Chief Administrative Law Judge

[1] The undersigned Administrative Law Judge presided via speaker telephone from the Judicial Officer Courtroom in Arlington, Virginia.

[2] Citations to exhibits admitted into the record are abbreviated to "Respondent's Exh." or "Petitioner's Exh." Citations to the transcript are abbreviated as "Tr., p. ____."

[3] This claim erroneously reported the date of injury as September 6, 2006.

[4] The record does not reflect why Petitioner's second claim was eventually approved, or why Petitioner did not successfully appeal the original claim for the same injury, given its eventual approval by OWCP. However,

neither fact is relevant to this discussion. Once OWCP makes a finding regarding a workers' compensation claim, including eligibility for COP payments, that finding is not subject to review in this forum. This review is limited to the validity of the debt at issue.

[5]

Petitioner was paid retroactive workers' compensation benefits for the same period of time in which she had previously received the COP payments from Respondent (Finding 9). Thus, even if Petitioner were entitled to COP payments for the second injury claim, she could not receive both OWCP benefits and COP payments for the same time period.

December 5, 2011

In the Matter of a Mail Dispute Between

RONALD D. TWOHATCHET
and

BRUCE DEAN POOLAW

P.S. Docket No. MD 11-264

APPEARANCE FOR DISPUTANT
RONALD D. TWOHATCHET:
Amos E. Black III, Esq.

APPEARANCE FOR DISPUTANT
BRUCE DEAN POOLAW:
C.W. Bill Morgan, Esq.

INITIAL DECISION

The disputants both seek receipt of mail addressed to the Kiowa Tribe of Oklahoma at Post Office Box 369, Carnegie, OK 73015-0369. Both disputants seek to be recognized as the present chairman of the Business Committee of the Kiowa Tribe of Indians of Oklahoma and therefore entitled to receive or direct receipt of the Kiowa Tribe's mail. Mr. Twohatchet asks that the mail be delivered as addressed, and released to him. Mr. Poolaw also asks that the mail be delivered as addressed, but that it be released at his direction to another official of the Kiowa Tribe, Ms. J. Artichoker, who has agreed to such a responsibility should the Judicial Officer so order. The Judicial Officer has directed the Carnegie, Oklahoma Postmaster to hold the Kiowa Tribe's mail pending resolution of this dispute.

I recommend that the Judicial Officer direct the postmaster to release the disputed mail to Mr. Twohatchet and to deliver future Kiowa Tribe mail as addressed for receipt by Mr. Twohatchet or as he otherwise directs.

FINDINGS OF FACT

1. The Kiowa Tribe of Indians of Oklahoma (the Kiowa Tribe) is a federally recognized Native American Indian Tribe (Affidavit of R. Twohatchet (Twohatchet Aff.) ¶ 1).
2. The Kiowa Indian Council (Council) is the governing body of the Kiowa Tribe and is composed of all eligible Kiowa Tribe members. The Council elects the members of the Kiowa

Business Committee (Business Committee) and votes on any recall elections (Kiowa

Tribal Constitution (Const.) Art. 1 § 2; Art. III § 2; Art. IV § 1).

3. The Business Committee is empowered to represent the Kiowa Tribe in all official

matters pertaining to tribal business not reserved to the Council and performs most

administrative tasks for the Kiowa Tribe. The Business Committee is composed of 8 members

— 4 officers (chairman, vice-chairman, treasurer and secretary) and 4 committeemen. Half of the

Business Committee officers and half the committeemen are elected each June, with members

serving two-year terms unless earlier recalled. (Const. Art. I §§ 1, 3; Art. III §§ 1, 3, 5; Art. V §§

2(b), 5). On June 19, 2010, the Council elected Mr. Twohatchet to be the Business

Committee's chairman for a two-year term (Twohatchet Aff. ¶ 3; Const. Art. III § 3). The

Business Committee's chairman presides at all Council and Business Committee meetings, and

has general supervision over Business Committee affairs (Const. Art. XII § 1).

4. The Kiowa Hearing Board (Hearing Board) is composed of 5 tribal elders, age 50

or greater, appointed by the Business Committee (Const. Art. XIV § 1).

5. A quorum of the 8-member Business Committee requires 5 members, and "no

business of any nature shall be transacted unless a quorum is present." (Const. Art. XV § 4).

6. Vacancies on the Business Committee are to be filled by election by the Council

provided that the vacancy is not created within 6 months of the next scheduled June election. If

it is, the vacancy is to be filled by appointment based on a majority vote of the remaining

Business Committee members so long as they form a quorum. Such interim Business

Committee members serve until the next scheduled election. (Const. Art. IV § 2).

7. If the Business Committee is permanently unable to raise a quorum, the

Commissioner of Indian Affairs is to call and supervise an election to bring the Business

Committee up to full complement (Const. Art. IV § 3).

8. In 2000, the Business Committee passed a resolution which enacted Hearing

Board procedures and ratified the Kiowa Hearing Board Ordinance (Ordinance) (Business

Committee Resolution attached to referral from Postal Service Counsel; Twohatchet Ex. 3).

9. The Hearing Board is empowered to conduct recall proceedings against elected

or appointed Kiowa Tribe officials. Such recall proceedings may follow either (a) a recall referral from the Business Committee, or (b) an appeal from denial by the Business Committee of a recall proposal. (Const. Art. IV §§ 1-2; Art. XIV § 2; Ordinance Art. X § 12; Twohatchet Aff. ¶ 21). If, following a hearing, the Hearing Board decides that a recall proposal should be voted upon by the Council, it refers the matter to the Kiowa Tribe's Election Board to conduct a recall election (Const. Art. XIV § 3).

10. All 5 Hearing Board members must be present to determine whether sufficient evidence justifies a recall election (Ordinance Art. X § 1; Twohatchet Aff. ¶¶ 13, 18, 21). However, if a Hearing Board member is temporarily unable to attend an appeal hearing due to serious illness or other reasons beyond his or her control and an appeal hearing has been scheduled, a temporary alternate Hearing Board member is to be appointed by the Business Committee so that 5 Hearing Board members hear the appeal (Ordinance Art. IV § 1; Art. X § 10). The Hearing Board is responsible to inform the Business Committee that an alternate Hearing Board member is needed (Ordinance Art. X § 10).

11. Recall appeal hearings before the Hearing Board are governed by judicial procedures (Ordinance Art. X §§ 1-12). The Hearing Board renders a decision on recall appeals after the hearing is adjourned. Decisions in appeals "will be made by majority vote of five members present." Such decisions "shall be final." (Ordinance Art. X § 12).

12. A recall proposal was filed against 7 of the 8 Business Committee members, including its chairman, Mr. Twohatchet. The recall proposal involved the appropriate remuneration of Business Committee members and alleged violations of the Kiowa Tribe Constitution. A hearing before that same Business Committee occurred on March 8, 2011. (Twohatchet Aff. ¶ 22; Twohatchet Response at p. 12; Poolaw Ex. 2). The only Business Committee member not subject to the recall proposal was Ms. Artichoker (Poolaw Aff. ¶ 2). Perhaps not surprisingly, the 8-member Business Committee denied the recall charges levied against 7 of its members (Twohatchet Aff. ¶ 22).

13. The Business Committee's denial of the recall proposal was appealed to the Hearing Board (Poolaw Ex. 2). After determining that it possessed jurisdiction, on April 21,

2011, the Hearing Board conducted a recall appeal hearing for the charges levied

against Mr. Twohatchet and the other 6 charged Business Committee members (Poolaw Aff.

¶ 2; Twohatchet Aff. ¶ 22). Although the Hearing Board's decision merely recites that a quorum was present, all 5 Hearing Board members were present at the April 21 hearing (Twohatchet

[1]

Aff. ¶ 22; Twohatchet response at p. 4; Poolaw Ex. 2).

14. Following adjournment of the hearing, the Hearing Board deliberated and issued

its decision on April 27, 2011. All 5 Hearing Board members were not present when this

decision was made. The Hearing Board voted 3-0, with 1 apparent abstention, to reverse the

decision of the Business Committee. It directed the Election Board to conduct a recall election

to be voted upon by the Council. (Poolaw Aff. ¶ 2, Ex. 2; Twohatchet Aff. ¶ 22).

15. On July 16, 2011, the recall election occurred. If valid, the Council's vote resulted

in recall of the 7 members of the Business Committee, leaving only Ms. Artichoker. (Poolaw

[2]

Aff. ¶¶ 3-4, Ex. 3; Statement of J. Artichoker (Artichoker St.) at p. 1; Affidavit of W. Quetone (Quetone Aff.) ¶ 18).

16. Believing that she was the only remaining Business Committee member, Ms.

Artichoker then appointed 5 members to the Business Committee, including the appointment of Mr. Poolaw as its chairman (Artichoker St. at pp. 1-2; Poolaw Aff. ¶ 4; Twohatchet ¶ 24).

17. Both Mr. Twohatchet as the pre-recall elected chairman of the Business

Committee and Mr. Poolaw, as the post-recall appointed chairman of the Business Committee claimed the right to receive the Kiowa Tribe's mail (Referral by Postal Service counsel and

attachments thereto). During the course of the resulting mail dispute Mr. Poolaw withdrew his request to receive the mail himself but persisted in this mail dispute by arguing that he should be recognized as chairman and that he directs Ms. Artichoker, as the only non-recalled and

undisputed Business Committee member, to receive the mail (see Poolaw Response at p. 11).

Ms. Artichoker is amenable to that resolution (Artichoker St. at p. 2).

18. On September 22, 2011, the Bureau of Indian Affairs (BIA) issued an interim

decision letter recognizing Mr. Twohatchet as chairman of the Business Committee on a

temporary 90-day basis. That interim decision, which does not explain the reasoning behind its

conclusion, has been appealed. (Artichoker St. at p. 1; Twohatchet Aff. ¶ 30, Ex. 7; Poolaw Aff. ¶ 5; Poolaw Response at p. 13).

19. Postal Service field counsel referred the mail dispute to the Judicial Officer, and the matter was assigned to the undersigned Administrative Judge. Following conferences with the parties, I established a schedule for submission of sworn statements and responses with which both parties complied.^[3]

DECISION

Arguments of the disputants

As a preliminary matter, Mr. Twohatchet argues that I should defer entirely to the BIA's interim ruling in his favor.

On the merits, Mr. Twohatchet presents three primary arguments. First, he asserts that the Hearing Board's determination to order a recall election was invalid because 2 Board members were ineligible due to expired terms, and because the decision was rendered without the participation of another undisputedly valid Hearing Board member. He therefore maintains that the July 16, 2011 recall election was legally invalid, resulting in his being retained as the cognizable chairman of the Business Committee entitled to receive the Kiowa Tribe's mail. Second, Mr. Twohatchet argues that the Election Board never authorized the recall election by a majority vote of a quorum of its members, an issue which I find unnecessary to resolve. Third, Mr. Twohatchet argues that even if the recall election were valid, Ms. Artichoker acting alone lacked the authority simply to appoint Mr. Poolaw as chairman of the Business Committee. He concludes that Mr. Poolaw's appointment as chairman is therefore ineffective, precluding any possibility of a ruling in Mr. Poolaw's favor.

Mr. Poolaw argues that the BIA's recognition of Mr. Twohatchet as chairman of the Business Committee is temporary only, is under appeal, and should be disregarded. He asserts that the Hearing Board's decision to conduct the July recall election was legally valid, and that the election was proper. He therefore argues that the Council's voting resulted in the valid recall of Mr. Twohatchet from chairman as well as the other 6 Business Committee Members. He asserts that Ms. Artichoker, as the only Business Committee member not

recalled, was vested with authority to appoint other members to the Business Committee, and that she appointed him as chairman. He asks that he be recognized as chairman and that Ms. Artichoker as the only undisputed member of the Business Committee should receive the mail at his direction.

The BIA's interim recognition of Mr. Twohatchet as chairman

It is the responsibility of the Judicial Officer, not the BIA, to direct delivery of disputed mail. To the extent that this office's determination must address the Kiowa Tribe's leadership dispute, we will do so. See *Phillip & Wendy Del Rosa and Darren Rose, Jennifer Chrisman & Joseph Burrell*, P.S. Docket No.

MD 10-91 (I.D. July 2, 2010); *Dennis J. Bowen and Karen Bucktooth*, P.S. Docket No. MD 95-59 (I.D. May 24, 1995).

Furthermore, the BIA's recognition of Mr. Twohatchet expressly was temporary, is about to expire, and in any event has been appealed (Finding 18). Deferring to it would result in the most fleeting of solutions to this mail dispute. Nonetheless, the BIA's interim decision is entitled to some weight, in Mr. Twohatchet's favor, in my deliberation. See *Dan Shoshone and Shiley Summers*, P.S. Docket No. MD 05-4 (I.D. March 25, 2005). Unfortunately, the BIA's determination does not explain the reasoning on which it was based (Finding 18).

The disputed mail should be delivered as directed by the president-equivalent of the Kiowa Tribe

Postal regulations do not address specifically the delivery of mail to Indian tribes. However, where such disputes have arisen, we have applied the postal regulations applicable to governmental and nongovernmental organizations. See *Sylvia T. Arzate and John Marcus*, P.S. Docket No. MD 04-181 (I.D. February 28, 2005). According to such regulations, the Postal Service should deliver the disputed mail according to the order of the tribe's "president or equivalent official." See *Del Rosa and Rose, Chrisman & Burrell*, P.S. Docket No. MD 10-91 (citing Postal Operations Manual § 614.1).

In this case, the Business Committee is responsible for administration of most tribal matters (Finding 3). Its directly elected chairman presides at all Council and Business Committee meetings, and has general supervision over Business Committee affairs (Finding

3). Furthermore, both parties base their extensive arguments on their beliefs that the chairman possesses the power to direct the Kiowa Tribe's mail. I find that the chairman of the Business Committee is the Kiowa Tribe's equivalent position of president, within the meaning of the applicable postal regulations (Findings 2-3).^[4] See *Christine Walker and Matthew Leivas, Sr.*, P.S. Docket No. MD-153 (I.D. July 24, 1992, P.S.D. August 28, 1992) ("appropriate to deliver mail addressed to the Chemehuevi Indian Tribe in accordance with the direction of the Chairman of the tribe's duly elected governing body"); see also *Sylvia T. Arzate and John Marcus*, P.S. Docket No. MD 04-181 (I.D. February 28, 2005) (to the same effect). In order to determine which disputant possesses the superior claim to be recognized as the Business Committee chairman, I examine and interpret the Kiowa Tribe's Constitution and its Hearing Ordinance. See *Walker and Leivas*, P.S. Docket No. MD-153.

The recall election was not authorized

Mr. Twohatchet was the directly elected chairman of the Business Committee prior to the July 16 recall election (Finding 3). Therefore, unless it is demonstrated that he was validly removed from that position, Mr. Twohatchet remains the proper recipient of the Kiowa Tribe's mail.

Although the Business Committee voted not to refer the recall proposal to the Hearing Board for an election by the Council, the matter was appealed to the Hearing Board (Findings 12-13). As required, the Hearing Board then conducted an appeal hearing, with all 5 members present, to determine whether a recall election should be conducted (Finding 13).^[5] However, the Hearing Board decided the appeal without all 5 members being present or part of the decision-making process (Finding 14). Aside from the controversy about the eligibility of 2 Hearing Board members, it is not disputed that a third Hearing Board member was not present when the recall appeal was decided, due to illness, and that he was not replaced (Finding 14).

The Hearing Board Ordinance not only requires that all 5 members participate during the hearing as a threshold jurisdictional matter, but it also specifically requires that all 5 members be present to decide the appeal. The Ordinance provides in this regard that "appeal decisions will be made by majority vote of five members present." (Findings 10-11; Ordinance

Art. X §12 (emphasis added)). I interpret this language to require that all 5 members

[6]

must be present when appeal decisions are rendered. As this did not occur, I find that the Hearing Board's decision to conduct a recall election was without legal effect.

While contesting his opponent's argument (in part based on allegations of fraud) that the

2 disputed Hearing Board members were ineligible, Mr. Poolaw does not appear to contest that

if the Ordinance were applied, it was improper for the Hearing Board to decide the appeal

without all 5 members present. However, Mr. Poolaw argues in his reply statement that the

Hearing Board Ordinance itself is unenforceable because it was never voted on by the Council.

He argues more specifically that the Kiowa Tribe Constitution requires only a quorum of 3, not

all 5 Hearing Board members, be present to conduct business and that a permissible quorum of

the Hearing Board decided the recall appeal. He argues that the Ordinance therefore conflicts

with the Constitution, and that the Constitution must control.

Mr. Poolaw's assertion is unsupported, and evidence concerning whether the Council

acted in 2000 in this regard was not presented. More importantly, approval of a hearing

ordinance is not a power reserved to the Council in the Kiowa Constitution. Further, the

Ordinance was passed by the Business Committee, which appears to have acted within its

authority (Finding 8). Moreover, I do not read the Ordinance's requirement for all 5 Hearing

Board members to decide a recall appeal to be inconsistent with the Constitution as Mr. Poolaw

argues. I have been unable to identify a Constitutional establishment of a 3-member Hearing

Board quorum, and Mr. Poolaw has not identified such a Constitutional provision. I find that the

Kiowa Constitution is silent regarding the number of Hearing Board members that must decide

a recall appeal. Therefore, the Ordinance's requirement that all 5 Hearing Board members

[7]

must be present does not conflict with the Constitution and is enforceable.

Accordingly, I find that the Hearing Board's decision to conduct the recall election was

invalid. This is the case regardless of whether the 2 disputed members were eligible.

Because the recall election was not legally ordered by the Hearing Board, the resulting

recall vote was ineffective to remove Mr. Twohatchet as elected chairman of the Business

Committee. While this is a sufficient ground on which to rule in his favor, an additional practical

reason supports that conclusion.

The appointment of Mr. Poolaw as Business Committee chairman was unauthorized in any event

It is apparent to me that even if the July recall election were effective, Ms. Artichoker as the sole remaining Business Committee member, lacked the authority to appoint Mr. Poolaw to the Business Committee as its chairman. I therefore would be unable to rule in Mr. Poolaw's favor even if the recall election were enforceable.

In this regard, the Kiowa Constitution is clear that the Business Committee is not permitted to conduct business "of any nature" without a quorum (Finding 5). Ms. Artichoker, acting alone, did not constitute a quorum, which requires 5 members (Finding 5).

The Kiowa Constitution includes specific procedures which must be followed to fill Business Committee vacancies. This must be accomplished by election, not appointment (as these vacancies created in July would not have been within 60 days prior to the next scheduled June election). (Finding 6). Moreover, the Kiowa Constitution contemplates a situation (as would be present here if the recall election were valid) in which a quorum cannot be attained. In such cases, the Commissioner of Indian Affairs must call and supervise an election to bring the Business Committee up to full complement (Finding 7). It is clear to me that Mr. Poolaw's appointment by Ms. Artichoker would not have been authorized, even if the recall election were enforceable.

Conclusion

Accordingly, I find it appropriate to award the mail to Mr. Twohatchet. I believe that it is Mr. Poolaw's burden to demonstrate that Mr. Twohatchet was lawfully removed, *see Arzate and Marcus*, P.S. Docket No. MD 04-181, and that he has failed to do so.

This decision deals only with delivery of the mail. It does not determine ownership of the contents of the mail and does not attempt to resolve any underlying disputes between the parties. If either party obtains a court order directing delivery of the mail, postal regulations provide that the mail will be delivered according to such an order. Postal Operations Manual § 616.3.

Recommended Order

This initial decision recommends that the Judicial Officer should issue an order directing the Carnegie Postmaster to release all held mail to Mr. Twohatchet and to deliver future mail addressed to the Kiowa Tribe of Oklahoma, at Post Office Box 369, Carnegie, OK 73015-0369, as addressed, for receipt by Mr. Twohatchet or as he otherwise directs.

Gary E. Shapiro
Administrative Judge

- [1] Mr. Twohatchet maintains and Mr. Poolaw contests that 2 of the 5 Hearing Board members were ineligible to participate because their terms had expired. The disputants vehemently argue this issue including accusations of forgery and fraud. Because I resolve this mail dispute on other grounds, I need not navigate that particular quagmire. Similarly, it is unnecessary for me to resolve another heated dispute between the parties concerning the Election Board's behavior following the Hearing Board's direction to conduct a recall election, referenced in Finding 14.
- [2] Ms. Artichoker's statement purports to be an affidavit. However, while it was notarized, it was not sworn and is being given the reduced weight of an unsworn statement.
- [3] Responses were due and were filed by the parties on November 21, 2011. On November 23, I received a letter from counsel for Mr. Twohatchet, in the nature of a sur-reply. On November 30, I received a responding letter from counsel for Mr. Poolaw, in the nature of a sur-sur-reply. Both letters have been considered although they address an issue which I do not reach.
- [4] This is not the first time the Judicial Officer has been called upon to address a leadership dispute involving the Kiowa Tribe in a mail dispute. See *Deborah S. Wilson and R.H. Boinly*, P.S. Docket No. MD 04-19 (I.D. April 5, 2004).
- [5] The parties vigorously dispute whether 2 Hearing Board members were eligible to participate. For purposes of this discussion, without deciding the issue, I assume that they were eligible and refer to them as Hearing Board members.
- [6] Otherwise, the Ordinance would be expected to read that a "majority vote" of a "quorum [consisting] of three members present" decides the matter, as is the case for "meetings to conduct ordinary routine business. . . . members present" (Ordinance Art. IX). In contrast, for recall appeal decisions, the Ordinance requires a majority vote of "five members present."
- [7] Where the Kiowa Constitution requires a majority of a quorum, it expressly so provides. For instance, in deciding whether to refer a recall proposal to the Hearing Board, the Business Committee is to decide by an affirmative vote "of a majority of the members of the committee." (Const. Art. IV § 1). No such language appears in the Constitution for the Hearing Board's decision. Furthermore, the requirement that all 5 members present must decide the appeal would seem to have sound policy behind it, and explains the Constitution's inclusion of procedures for a temporary appointment of a Hearing Board member where necessary. As Hearing Board decisions are final and not subject to appeal, allowing a decision by a majority of a 3-person quorum could result in a binding recall appeal decision being issued by only 2 members (a minority of the full Hearing Board).

December 15, 2011

In the Matter of the Petitions by

PATRICIA MITCHELL

at

Baton Rouge, LA

P.S. Docket Nos. DCA 11-205,
DCA 11-206 and DCA 11-207

APPEARANCE FOR PETITIONER:
Patricia Mitchell

APPEARANCE FOR RESPONDENT:
Avis M. Beard
Manager, Labor Relations
United States Postal Service

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

On December 9, 2011, I held a telephone conference with Petitioner Patricia Mitchell, and Respondent's representative Avis Beard.

At my request, Respondent elaborated on her earlier pleading submitted in response to my September 29, 2011 *Order to Show Cause* to explain Respondent's delay in responding to this case. In her November 17, 2011 written response, Ms. Beard noted that she had been detailed to another location and that in her absence the case had not been assigned.^[1] In our telephone conference, Ms. Beard further explained the circumstances of her detail.

I noted to Ms. Beard that our records demonstrated that the *Notice of Docketing of Petition* in this matter was received by Respondent and a Form 3811 signed by "Mike Collier" on July 7, 2011. Additional documentation, including a copy of the Notice of Involuntary Administrative Salary Offsets was received by Respondent on August 16, 2011, and the Form 3811 signed by "E. Smith."^[2] Still further documentation submitted by Petitioner was served on Respondent and a Form 3811 signed by "EJ Dupart" on October 4, 2011. Finally, the *Order to Show Cause* was delivered on October 4, 2011, and was also signed on the Form 3811 by "EJ Dupart."

After discussion with Ms. Beard about the signatures on the Form 3811's, it became apparent that the reason for Respondent's failure to respond in a timely manner, while not Ms. Beard's fault, was the result of a failure of any person in her office to respond to repeated Orders from this office in her absence. Upon receipt of the documentation and Orders in this case, no personnel for Respondent bothered to telephone this office to explain Ms. Beard's detail, to request additional time, or to take any action that would have preserved Respondent's rights to prosecute these debts. Such failure and indifference to this case does not constitute the good cause necessary to remove this default.

As Respondent received all notices and Orders in this matter in a timely manner, and Respondent has failed to establish good cause for the delay in responding to these Orders, I find that Respondent is in default. Accordingly, Petitioner is entitled to entry of judgment in her favor. [3]

ORDER

The consolidated Petitions are GRANTED. Respondent may not collect the debts of \$10,827.71 (DCA 11-205), \$3,290.27 (DCA 11-206), or \$860.97 (DCA 11-208) by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

[1]

Respondent's response was submitted after the October 12, 2011 deadline in the *Order to Show Cause*. For the purposes of this Decision, I accepted the late filing, but rejected the arguments brought forth as insufficient to establish good cause. [2]

Mr. Smith was apparently Ms. Beard's temporary replacement in her position as Manager of Labor Relations in that office. [3]

During the telephone conference, Ms. Beard raised an issue relative to a grievance settlement between the union and Respondent over the debt at issue in DCA 11-208 (\$860.97). After review of the settlement agreement submitted by Respondent, I note that Petitioner was not a signatory to the grievance settlement. While the agreement may resolve the grievance, it is not binding upon me under the Debt Collection Act. See *Employee and Labor Relations Manual* (ELM) §462.22(c). Accordingly, the Decision above resolves the debt at issue in the grievance settlement in favor of Petitioner.

September 21, 2011

In the Matter of the Petition by

HERMENEGILDO LOPEZ

at
New York,

P.S. Docket No. DCA 11-128

APPEARANCE FOR PETITIONER:

Albert E. Lum

APPEARANCE FOR RESPONDENT:

Katherine Ferlauto

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Hermengildo Lopez, filed a Petition for Hearing on April 13, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$1,760 based upon a shortage in the unit reserve for which Petitioner was custodian. A hearing was conducted on July 12, 2011, in Islandia, New York. ^[1] The following findings are based upon the record.

FINDINGS OF FACT

1. Petitioner was served with a Notice of Involuntary Administrative Salary Offsets dated April 9, 2011 (Petition Attachment).
2. Petitioner was unit reserve custodian for a subsidiary of the Merrick Post Office referred to as Bank Plaza Station at all relevant times (Tr., p. 16). ^[2]
3. As the result of the Merrick Post Office unit reserve custodian's prolonged absence during the summer of 2010, Petitioner transferred stock from the Bank Plaza Station unit reserve directly to the retail floor stock at the Merrick Post Office (Tr., pp. 65-66).
4. Petitioner's practice was to transfer the stock from the Bank Plaza Station, maintain handwritten notes of the transfer, and execute the appropriate paperwork for the transfer after the fact (*id.*).
5. As part of these stock transfers, sometime prior to September 25, 2010, Petitioner transferred 100 books of Item Number 678800 (hereafter "*Love King and Queen*").

stamps") and 100 books of Item Number 679000 (hereafter "The Simpsons stamps") from the Bank Plaza Station unit reserve to the Merrick Post Office retail floor stock (Tr., pp. 66-70).

6. Sometime after the transfer described above, but prior to September 25, 2010, Petitioner also became unit reserve custodian at the Merrick Post Office (Tr., p. 68).

7. After Petitioner became unit reserve custodian at both facilities, he transferred stock from the unit reserve at the Merrick Post Office, to the retail floor stock at the Merrick Post Office, then to the unit reserve at the Bank Plaza Station, to replenish the stock he had previously transferred directly to the Merrick Post Office retail floor stock (Tr., pp. 66; 78-80). At the time Petitioner became unit reserve custodian at the Merrick Post Office, there were no *Love King and Queen* stamps or *The Simpsons* stamps in the unit reserve at the Merrick Post Office. Therefore he was unable to transfer those items to the retail floor stock for eventual transfer to the Bank Plaza Station unit reserve. (Tr., p. 66).

9. Instead, Petitioner ordered 100 books of *Love King and Queen* stamps and 100 books of *The Simpsons* stamps through the Stamp Distribution Office (SDO) for eventual return to the unit reserve at the Bank Plaza Station (Tr., pp. 66-67).

10. Once these books were delivered to the Merrick Post Office unit reserve from the SDO, Petitioner took the stamps to the Bank Plaza Station to replenish the stamps he previously transferred from that unit reserve location to the retail floor stock at Merritt Post Office (Respondent's Exh. 17; Tr., p. 67).

11. However, in doing so, he forgot to execute a P.S. Form 17 or any other paperwork to document this transfer out of the Merrick Post Office unit reserve (Respondent's Exh. 17; Tr., pp. 37; 67; 73-74; 79).

12. On September 25, 2010, an audit was conducted of the retail floor stock at the Merrick Post Office (Tr., p. 13).

13. The count of the retail floor stock revealed a stock shortage and triggered an audit of the unit reserve (Tr., pp. 13; 38).

14. On September 25, 2010, a properly conducted audit of the unit reserve at the

Merrick Post Office revealed a shortage of \$1,760, consisting of a shortage of 100 books of *Love King and Queen* stamps (\$8.80) and 100 books of *The Simpsons* stamps (\$8.80)(Respondent's Exh. 2; Tr., pp. 14; 38-39).

15. The Debt Collection Act Petition was timely filed.

DECISION

Under the Debt Collection Act, the initial burden lies with Respondent to establish that an actual loss exists in an account for which the employee is responsible. See *Victoria Bingham*, P.S. Docket No. DCA 09-177 (December 7, 2009). Respondent is not required to prove any specific dereliction, or act of negligence by Petitioner. Initially, it is sufficient that Respondent show that after a properly conducted inventory or audit a stock shortage exists in an account for which Petitioner is accountable. *Christina A. Lamb*, P.S. Docket No. DCA 09-203 (October 30, 2009).

It is uncontested that Petitioner was unit reserve custodian, and that the unit reserve audit conducted on September 25, 2010, was conducted in an account for which Petitioner was accountable (Findings 6, 14). The audit revealed a combined shortage of \$1,760 for *Love King and Queen* stamps and *The Simpsons* stamps (Finding 14). Accordingly, Respondent has met its initial burden.

Petitioner does not contest the validity of the audit, nor that he was the unit reserve custodian at the time of the loss. Instead, Petitioner argues that a corresponding overage in the retail floor stock with respect to the two specific item numbers that comprised the unit reserve shortage should be applied to this debt as an offset. In doing so, Petitioner relies on my decision in *Robert Porter*, P.S. Docket No. DCA 10-290 (February 15, 2011)(Petitioner held not accountable due to corresponding overage in retail floor stock). For the reasons that follow, that case is not applicable in this situation.

Petitioner explained in detail how he transferred stock between the different accountability units prior to his appointment as unit reserve custodian in both locations. His method of transferring stock, while unorthodox, was consistent during his time as unit reserve custodian at the Bank Plaza Station (Tr., pp. 79-80). Respondent does not dispute Petitioner's

testimony about this practice, except to note that Petitioner did not file the appropriate paperwork for the transfer at issue, and thus should be held accountable (Tr., p. 17). However, if failure to follow proper procedures were the sole standard to apply in such cases, no hearing would be necessary, as rarely does such a shortage exist when all the rules have been faithfully adhered to by Petitioner. Instead, the standard we apply is whether Petitioner has established, by a preponderance of the evidence, that his explanation is more likely than not the cause of the shortage in the unit reserve. If so, then there exists no debt for which Petitioner is accountable.

While Respondent is correct that Petitioner failed to follow proper procedures, and Respondent is also correct that overall shortages in the retail floor stock may represent actual losses to the Postal Service, Petitioner need only prove that he is not responsible for the shortage in the unit reserve. Petitioner readily admits that it was his error that led to the shortage. However, we have stated many times that the Debt Collection Act is not a vehicle to punish poor job performance where no actual loss is shown. See, e.g., *Danny J. Smith*, P.S. Docket No. DCA 09-90 (September 3, 1990); see also, *Peter G. Harris*, P.S. Docket No. DCA 09-41 (August 26, 2009); *Albertha Johnson*, P.S. Docket No. DCA 04-71 (August 23, 2004); *Robert Capone*, P.S. Docket No. DCA 02-500 (February 21, 2003).

In this case, it is not the overage in the retail floor stock that relieves Petitioner of responsibility for the debt. Instead, I find that Petitioner's testimony about the transfer of the stock during the summer of 2010, particularly his explanation about the transfer that led to the shortage (Findings 10-11), is more likely than not the basis for the shortage in the Merrick Post Office unit reserve. In so finding, I also conclude that no actual loss exists for which Petitioner is liable under the Debt Collection Act.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

[1]

The undersigned Administrative Law Judge presided via speaker telephone from the Judicial Officer Courtroom in Arlington, Virginia.

[2]

Citations to exhibits admitted into the record are abbreviated to "Respondent's Exh." or "Petitioner's Exh." Citations to the transcript are abbreviated as "Tr., p. ____."

December 16, 2011

In the Matter of the Petition by

ABDELMAJID LARHDIFI

at

Indianapolis, IN

P.S. Docket No. DCA 10-272

APPEARANCE FOR PETITIONER:

Abdelmajid Larhdifi

APPEARANCE FOR RESPONDENT:

Brad Spurgeon

Labor Relations Specialist

United States Postal Service

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

On November 30, 2011, I issued an *Order to Show Cause* in this matter noting that Respondent had failed to file a response to the original Petition for well over one year. In that *Order to Show Cause*, Respondent was directed to file an Answer and explanation for the delay not later than December 9, 2011. Also in that *Order to Show Cause*, I directed Petitioner to contact this Office, as the numbers provided by Petitioner were not valid contact numbers. Petitioner did contact this Office in a timely manner and a telephone conference was held on December 7, 2011 (see *Order and Memorandum of Telephone Conference* dated December 7, 2011).

Subsequent to the telephone conference, Respondent complied with the *Order to Show Cause*, and filed an Answer and explanation on December 9, 2011. Respondent explained that the delay in the response was largely attributable to multiple staff changes within the Office of Labor Relations, including a retirement of a prior Labor Relations Specialist (May 31, 2011) and the transfer of her manager (no date provided). Unfortunately, there is no explanation why the prior Labor Relations Specialist, who remained in her position through May 31, 2011, or the Labor Relations Manager, who remained in his position beyond that date,

September 21, 2011

In the Matter of the Petition by

HERMENEGILDO LOPEZ

at

New York,

P.S. Docket No. DCA 11-128

APPEARANCE FOR PETITIONER:

Albert E. Lum

APPEARANCE FOR RESPONDENT:

Katherine Ferlauto

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Petitioner, Hermengildo Lopez, filed a Petition for Hearing on April 13, 2011.

Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$1,760 based upon a shortage in the unit reserve for which Petitioner was

custodian. A hearing was conducted on July 12, 2011, in Islandia, New York.^[1] The following findings are based upon the record.

FINDINGS OF FACT

1. Petitioner was served with a Notice of Involuntary Administrative Salary Offsets dated April 9, 2011 (Petition Attachment).

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4. Petitioner's practice was to transfer the stock from the Bank Plaza Station, maintain handwritten notes of the transfer, and execute the appropriate paperwork for the transfer after the fact (*id.*).

5. As part of these stock transfers, sometime prior to September 25, 2010, Petitioner transferred 100 books of Item Number 678800 (hereafter "*Love King and Queen*")

Merrick Post Office. Therefore he was unable to transfer those items to the retail floor stock for eventual transfer to the Bank Plaza Station unit reserve. (Tr., p. 66).

9. Instead, Petitioner ordered 100 books of Love King and Queen stamps and 100 books of *The Simpsons* stamps through the Stamp Distribution Office (SDO) for eventual

return to the unit reserve at the Bank Plaza Station (Tr., pp. 66-67).

10. Once these books were delivered to the Merrick Post Office unit reserve from the SDO, Petitioner took the stamps to the Bank Plaza Station to replenish the stamps he previously transferred from that unit reserve location to the retail floor stock at Merritt Post

Office (Respondent's Exh. 17; Tr., p. 67).

11. However, in doing so, he forgot to execute a P.S. Form 17 or any other

paperwork to document this transfer out of the Merrick Post Office unit reserve (Respondent's Exh. 17; Tr., pp. 37; 67; 73-74; 79).

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13. The count of the retail floor stock revealed a stock shortage and triggered an audit of the unit reserve (Tr., pp. 13; 38).

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September 21, 2011

In the Matter of the Petition by

HERMENEGILDO LOPEZ
at
New York,

P.S. Docket No. DCA 11-128

APPEARANCE FOR PETITIONER:
Albert E. Lum

APPEARANCE FOR RESPONDENT:
Katherine Ferlauto

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

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Petitioner also became unit reserve custodian at the Merrick Post Office (Tr., p. 68).

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stock from the unit reserve at the Merrick Post Office, to the retail floor stock at the Merrick

Post Office, then to the unit reserve at the Bank Plaza Station, to replenish the stock he had

previously transferred directly to the Merrick Post Office retail floor stock (Tr., pp. 66; 78-80).

8. At the time Petitioner became unit reserve custodian at the Merrick Post Office,

there were no *Love King and Queen* stamps or *The Simpsons* stamps in the unit reserve at the

Merrick Post Office. Therefore he was unable to transfer those items to the retail floor stock

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15. The Debt Collection Act Petition was timely filed.

DECISION

Under the Debt Collection Act, the initial burden lies with Respondent to establish that an actual loss exists in an account for which the employee is responsible. See *Victoria Bingham*, P.S. Docket No. DCA 09-177 (December 7, 2009). Respondent is not required to prove any specific dereliction, or act of negligence by Petitioner. Initially, it is sufficient that Respondent show that after a properly conducted inventory or audit a stock shortage exists in an account for which Petitioner is accountable. *Christina A. Lamb*, P.S. Docket No. DCA 09-203 (October 30, 2009).

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Petitioner does not contest the validity of the audit, nor that he was the unit reserve custodian at the time of the loss. Instead, Petitioner argues that a corresponding overage in the retail floor stock with respect to the two specific item numbers that comprised the unit reserve shortage should be applied to this debt as an offset. In doing so, Petitioner relies on my decision in *Robert Porter*, P.S. Docket No. DCA 10-290 (February 15, 2011)(Petitioner held not accountable due to corresponding overage in retail floor stock). For the reasons that follow, that case is not applicable in this situation.

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However, if failure to follow proper procedures were the sole standard to apply in such cases, no hearing would be necessary, as rarely does such a shortage exist when all the rules have been faithfully adhered to by Petitioner. Instead, the standard we apply is whether Petitioner has established, by a preponderance of the evidence, that his explanation is more likely than not the cause of the shortage in the unit reserve. If so, then there exists no debt for which Petitioner is accountable.

While Respondent is correct that Petitioner failed to follow proper procedures, and Respondent is also correct that overall shortages in the retail floor stock may represent actual losses to the Postal Service, Petitioner need only prove that he is not responsible for the shortage in the unit reserve. Petitioner readily admits that it was his error that led to the shortage. However, we have stated many times that the Debt Collection Act is not a vehicle to punish poor job performance where no actual loss is shown. See, e.g., *Danny J. Smith*, P.S. Docket No. DCA 09-90 (September 3, 1990); see also, *Peter G. Harris*, P.S. Docket No. DCA 09-41 (August 26, 2009); *Albertha Johnson*, P.S. Docket No. DCA 04-71 (August 23, 2004); *Robert Capone*, P.S. Docket No. DCA 02-500 (February 21, 2003).

In this case, it is not the overage in the retail floor stock that relieves Petitioner of responsibility for the debt. Instead, I find that Petitioner's testimony about the transfer of the stock during the summer of 2010, particularly his explanation about the transfer that led to the shortage (Findings 10-11), is more likely than not the basis for the shortage in the Merrick Post Office unit reserve. In so finding, I also conclude that no actual loss exists for which Petitioner is liable under the Debt Collection Act.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

[1]

The undersigned Administrative Law Judge presided via speaker telephone from the Judicial Officer Courtroom in Arlington, Virginia.

[2]

Citations to exhibits admitted into the record are abbreviated to "Respondent's Exh." or "Petitioner's Exh." Citations to the transcript are abbreviated as "Tr., p. ____."

December 16, 2011

In the Matter of the Petition by

ABDELMAJID LARHDIFI

at

Indianapolis, IN

P.S. Docket No. DCA 10-272

APPEARANCE FOR PETITIONER:

Abdelmajid Larhdifi

APPEARANCE FOR RESPONDENT:

Brad Spurgeon

Labor Relations Specialist

United States Postal Service

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

On November 30, 2011, I issued an *Order to Show Cause* in this matter noting that Respondent had failed to file a response to the original Petition for well over one year. In that *Order to Show Cause*, Respondent was directed to file an Answer and explanation for the delay not later than December 9, 2011. Also in that *Order to Show Cause*, I directed Petitioner to contact this Office, as the numbers provided by Petitioner were not valid contact numbers. Petitioner did contact this Office in a timely manner and a telephone conference was held on December 7, 2011 (*see Order and Memorandum of Telephone Conference* dated December 7, 2011).

Subsequent to the telephone conference, Respondent complied with the *Order to Show Cause*, and filed an Answer and explanation on December 9, 2011. Respondent explained that the delay in the response was largely attributable to multiple staff changes within the Office of Labor Relations, including a retirement of a prior Labor Relations Specialist (May 31, 2011) and the transfer of her manager (no date provided). Unfortunately, there is no explanation why the prior Labor Relations Specialist, who remained in her position through May 31, 2011, or the Labor Relations Manager, who remained in his position beyond that date,

[1]

failed to respond to the Petition in a timely manner. While staff changes present challenges in any organization, they alone do not suffice in this case as good cause to ignore a Petition for well over a year. As Respondent's explanation for the delay in the response to the Petition is insufficient to establish good cause, Respondent is in default in this matter. Accordingly, Petitioner is entitled to judgment in his favor.

ORDER

The Petition is GRANTED. Respondent may not collect the debt of \$1,000 by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

[1]

According to Respondent, Labor Relations Specialist Juli Sheffield served until May 31, 2011, and Labor Relations Manager John Monser remained until sometime after that date prior to his transfer. Our records show that service was made upon John Monser of the original Petition on October 5, 2010, in his capacity as Labor Relations Manager, and signed for by "L Seymour" on that date. The fact that Mr. Monser may have normally assigned Ms. Sheffield such matters, and that Ms. Sheffield retired many months later, does little to explain why this Petition was ignored by Labor Relations prior to her retirement, or for the many months following her retirement.

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and the relocation brochure she was given specifically directed Petitioner to the F-15 Handbook for detailed information concerning relocation benefits and limitations (Finding 4). During the relocation process, Petitioner repeatedly was directed to the F-15 handbook for guidance, and on the Form 178 authorizing her relocation, Petitioner certified that she had read the appropriate sections of the F-15 Handbook (Finding 9). The F-15 Handbook was a regulation of the Postal Service (39 C.F.R. §211.2 (a)(3)) and defined the scope of relocation benefits afforded its employees. That no one specifically and personally warned Petitioner of the consequence of moving with her household furnishings into a house she owned does not relieve her of limitations imposed by Respondent's regulation. See *United States v. Bar Bea Trucking Co.*, 713 F.2d 1563, 1567 (Fed. Cir. 1983).^[6]

Petitioner argues that the actions of Respondent's officials in allowing her to keep the money for two-and-one-half years before attempting recovery, authorizing the temporary quarters benefit in the first place, and granting Petitioner an extension to the two-year period to use the home purchase benefit waived the limitations of the F-15 Handbook. Respondent has demonstrated that Petitioner was not entitled to a temporary quarters allowance. Thus, granting the benefit in the first place was erroneous, and Petitioner is not entitled to keep a benefit granted her in error. See *Jill Jacquin*, P.S. Docket No. DCA 96-371 (January 24, 1997). While a prompt recovery of the unauthorized benefit would have been preferable, there is no statute of limitations that would preclude Respondent from recovery at this time, *Kathryn L. Schrack*, P.S. Docket Nos. DCA 11-52, DCA 11-53, and DCA 11-54 (August 26, 2011), and Petitioner has not demonstrated prejudice stemming from the collection delay.

Moreover, Petitioner led the postal officials granting the extension to believe that her San Diego house was a rental. Had they known that Petitioner had moved into her own home and moved her furnishings in, Petitioner would not have been granted the extension. (Findings 22, 23). Under these circumstances extending the time for use of the home purchase benefit does not demonstrate that Respondent's officials agreed that Petitioner's receipt of the temporary quarters allowance was appropriate.

Avoidance of Unnecessary Expenses

purchase benefit; (3) Respondent unfairly delayed collection for two-and-one-half years; (4) Respondent failed to advise her of her appeal rights; (5) the F-15 Handbook does not

authorize requiring her to pay back the allowance under circumstances present here; and (6) it was always her intention that her San Diego house would only be her temporary residence.

The F-15 Handbook

The F-15 Handbook defines temporary quarters as lodging obtained "from commercial

sources." (Finding 7). Upon returning to San Diego, Petitioner moved into the house she owned there (Finding 17), not to lodging obtained from commercial sources. Additionally,

because she received her household goods at the same time she moved into the San Diego house (Finding 17), a few days before reporting to her new job (Finding 19), she did not suffer the inconveniences of temporary lodging that the temporary quarters allowance is intended to alleviate, i.e., lack of permanent lodging with laundry facilities and a kitchen to prepare meals (Finding 6). Moreover, under explicit limitations given emphasis in the F-15 Handbook, moving her household goods into her San Diego house disqualified Petitioner from receiving a

[4]

temporary quarters allowance (Finding 7). Additionally, as she had her household goods, her relocation experience does not justify recovery of a benefit designed to defray subsistence

[5]

expenses stemming from temporary quarters occupancy (Finding 6). Consequently, she was not entitled to a temporary quarters allowance under the F-15 Handbook.

Petitioner argues that she was not aware of the consequence of moving her household

furnishings into her San Diego house. She blames this on Respondent because (1) neither

postal employees nor the Cartus representative involved with her relocation told her (Finding

16); (2) none of the forms she was required to complete asked whether she was moving into a

house she owned (Finding 16); (3) the relocation brochure she was provided did not alert her to

that limitation (Finding 16); and (4) she was notified that the F-15 Handbook was under revision

(Finding 4) and assumed it no longer applied.

Whether the F-15 Handbook was being revised has no bearing on its applicability at the

time of her relocation. Further, the postal employee who advised Petitioner that the F-15

Handbook was under revision also told her where to find the F-15 Handbook on the internet,

40. Petitioner's September 1, 2011 annuity payment included a reimbursement from OPM of \$1,969.19 (Annuity Statements).

41. The total amount claimed by Respondent is \$12,938. It has collected a total of \$5,148.76 (\$3,179.57, the net of Petitioner's pay-for-performance award (Finding 32), plus \$1,969.19 collected from Petitioner's May 1, 2011 annuity payment (Finding 34)).^[3] In this proceeding Petitioner challenges Respondent's retention of the amounts withheld and its intention to collect the remainder, \$7,789.24, from her future annuity payments.

DECISION

Scope of Decision

Petitioner challenged Respondent's refusal to pay her closing costs for the August 2010 purchase of her home in San Clemente (Findings 25, 26, 28) as well as Respondent's intended involuntary collection of the \$12,938 temporary quarters allowance. Respondent's Answer addressed both issues. In a July 13, 2011 telephone conference (confirmed by a July 14, 2011 *Order and Memorandum of Telephone Conference*), I advised the parties that 39 C.F.R. Part 966 authorized consideration only of the second issue. I have no authority to consider Respondent's refusal to pay Petitioner's closing costs. Accordingly, this Initial Decision will decide only Petitioner's challenge to Respondent's recovery of the temporary quarters allowance.

Positions of the Parties

Respondent argues that it is entitled to recover the lump sum temporary quarters allowance Petitioner received because its relocation regulations do not authorize a temporary quarters allowance under the circumstances of Petitioner's relocation. It argues that as the payment was made to Petitioner erroneously, Respondent is entitled to recover it.

Petitioner argues she should not be denied the temporary quarters allowance because (1) the F-15 Handbook does not explicitly state that she was not entitled to the benefit and Respondent's officials' understood she was entitled to receive it; (2) Respondent's representatives waived recovery by leading her to believe she was entitled to the benefit by granting it in the first place and by subsequently extending the time for her to claim the home

repayment of the temporary quarters allowance Petitioner received in 2008 (Pet. Exhs. 1 (p. 44), 3 (p. 35); Resp. Exhs. 21, 22; Tr. 137).

31. On April 20, 2011, Petitioner's former manager denied reconsideration of the debt. He concluded that Petitioner was not entitled to a temporary quarters allowance under Postal Service regulations because she moved into a house she owned at her new duty station. He noted that her \$4,323 pay-for-performance award would be credited toward the debt, and he demanded that she pay the remaining \$8,615 balance within 14 days. He advised that if she failed to do so, "we will take the necessary steps to collect this amount involuntarily." He concluded the letter by advising Petitioner of her right to file a petition under 39 C.F.R. Part 966. (Resp. Exh. 11; Pet. Exhs. 1 (p. 52), 3 (p. 43)).

32. Respondent withheld the net amount of Petitioner's pay-for-performance award, \$3,179.57, and applied it to the claimed debt (Resp. Exh. 22).

33. Respondent requested the Office of Personnel Management ("OPM") to collect from Petitioner's annuity to satisfy her debt to Respondent (Resp. Exh. 20).

34. The amount of \$1,969.19 was withheld from Petitioner's May 1, 2011 annuity payment (Pet. Exh. 2, pp. 28-29; Resp. Exhs. 21, 22; Annuity Statements submitted with Petitioner's Brief ("Annuity Statements")).

35. Petitioner's timely Petition for Review Under 39 C.F.R. Part 966 was docketed May 9, 2011. The Notice of Docketing required Respondent to stay collection action in accordance with the applicable rules of practice (39 C.F.R. §966.5).

36. The amount of \$1,969.19 was withheld from Petitioner's June 1, 2011 annuity payment (Resp. Exhs. 21, 22; Annuity Statements).

37. By Order dated June 3, 2011, I directed Respondent to refund any withholdings made after Petitioner filed her Petition.

38. On June 17, 2011, Respondent reimbursed Petitioner \$1,969.19 (Resp. Exh. 21; Declaration of M. Petrachek, Exhibits A – D).

39. The amount of \$1,969.19 was withheld from Petitioner's July 1, 2011 annuity payment (Annuity Statements).

extension did not know Petitioner had moved back into a house she owned when relocating in 2008. If she had known, she would not have granted the extension. (Tr. 74, 93-94).

24. On July 7, 2010, Petitioner asked her Cartus representative whether she would still receive the new home purchase benefits if she retired before closing the purchase of a new home but still closed before September 30, 2010. The representative advised her that once she retired, no further relocation benefits would be paid. (Pet. Exh. 4, p. 13).

25. On August 30, 2010, Petitioner bought a house in San Clemente, California, near her son's home and the location where she wished to live after she retired from the Postal Service (Pet. Exh. 3, p. 23).

26. On September 2, 2010, Petitioner filed a claim with Respondent for recovery of her closing costs of \$9,629.15 for the San Clemente house (Pet. Exh. 1, pp. 28-33; Resp. Exh. 1, p. 7).

27. Petitioner retired from the Postal Service effective September 30, 2010 (Resp. Exhs. 4, 20). She lived in her San Diego house until she moved to San Clemente (Tr. 219).

28. On October 1, 2010, Petitioner's former manager denied Petitioner's claim for closing costs, stating that they were not recoverable because they were for a second home. He added that the \$12,938 temporary quarters portion of the lump sum paid Petitioner must be repaid: "As you relocated to your new duty station to a home you owned, which was and continued to be your principal residence, you were not eligible for the temporary quarters allowance." He followed that letter with a Letter of Debt Determination on October 4, repeating the demand that Petitioner repay \$12,938 and offering Petitioner an opportunity to request reconsideration. (Pet. Exhs. 1 (p. 37), 3 (pp. 28-29); Resp. Exh. 12; Tr. 162-163).

29. On October 7, 2010, Petitioner requested reconsideration, arguing that she never intended for her San Diego house to be her permanent or principal residence, and that the San Clemente house is her permanent residence (Pet. Exh. 1 (p. 41), 3 (p. 32)).

30. On March 4, 2011, Petitioner wrote to her former manager complaining that she was entitled to a pay-for-performance bonus earned before her retirement (Pet. Exhs. 1 (p. 43), 3 (p. 34); Tr. 167, 184). An award was made, but Respondent withheld the full amount to apply to

17. Cartus coordinated the move of Petitioner's household furnishings from Denver to San Diego. At Petitioner's direction, her household goods were delivered to her San Diego house on March 28, 2008, the same day she moved in. (Resp. Exhs. 1 (pp. 27-34), 3, 17; Tr. 37).

18. Petitioner lived in the house for about a month. She then moved into a townhouse in San Diego that she had previously rented for her son (Tr. 180, 189, 216-217). She moved back to her house in October 2008. From December 2008 until July 2010, she rented part of the house to a tenant (Tr. 180), but thereafter, Petitioner was the sole occupant. (Resp. Exh. 1 (pp. 11-12), 3, 7; Tr. 179).

19. Petitioner reported to her new job at the Pacific Area Office in San Diego on March 31, 2008 (Pet. Exh. 3, p. 9; Resp. Exhs. 3, 7).

20. The Postal Service bought Petitioner's Denver home no later than May 6, 2008. Up until that time Petitioner paid all expenses of owning her Denver house. (Resp. Exh. 14; Tr. 50-52, 64).

21. During the period from her 2008 relocation to San Diego through 2010, Petitioner tried to buy at least two houses in San Diego and three houses near where her son then lived, about a 60-mile commute from her office. (Pet. Exhs. 1 (p. 16), 3 (pp. 17-18, 44-46); Resp. Exhs. 5, 6; Tr. 221).

22. Near the end of the two-year relocation period, Petitioner requested a one-year extension to use a relocation benefit that would cover closing costs of her acquisition of a permanent residence at her new duty station. On April 13, 2010, the Headquarters relocation office granted a six-month extension, to September 30, 2010. (Resp. Exh. 6; Pet. Exhs. 1 (pp. 16-20), 3 (pp. 17-23); Tr. 72-73).

23. When considering Petitioner's extension request, a postal financial systems analyst in San Diego asked Petitioner whether she owned a home in San Diego. Petitioner told her she did but that it was a rental. (Tr. 151-152). Had she known Petitioner had lived in her own house since her relocation in 2008, the analyst would not have recommended approval of the extension request (Tr. 152-154). Respondent's Headquarters relocation official granting the

hunting trip and \$12,938 for the temporary quarters allowance. The temporary quarters allowance was calculated by multiplying the sum of the standard GSA lodging and meal rates for travelers in San Diego (\$146 per day and \$64 per day, respectively) by 60 days (60 x \$210 = \$12,600) and adding the cost of one round trip airfare between Denver and San Diego (\$338). (Resp. Exhs. 3, 24; Tr. 135-136).

13. Respondent contracts with a relocation company, Cartus, to coordinate employee relocations. On February 14, 2008, a Cartus representative advised Petitioner of the relocation benefits available to her, including the compensation for house hunting trips and temporary quarters. She wrote regarding the lump sum temporary quarters allowance, "There are no receipts required and the money is to be used at your discretion." She also advised that Petitioner had two years from her report-to-work date to complete her relocation. (Pet. Exh. 3, p. 11; Resp. Exh. 10).

14. Cartus representatives coordinate employee relocations and administer available relocation benefits but have no authority to approve, change, or allow relocation benefits not authorized by Respondent (Tr. 52-54, 108-109).

15. Petitioner has owned a house in San Diego since 1998. At least part of the house had been rented to a tenant up to 2007; thereafter it was occupied periodically by her son, who paid no rent. Petitioner paid the mortgage and all other costs of the house while she was in Denver. (Resp. Exhs. 1 (pp. 5, 8), 3, 5; Tr. 179, 181, 217-218).

16. In processing Petitioner's move, neither Respondent's employees nor the Cartus representative told Petitioner that moving into her own house in San Diego would disqualify her from receiving a temporary quarters allowance. The Cartus representative did not ask Petitioner if she owned a house in San Diego. The F-15 Handbook did not specifically point out that moving into a house owned by the employee at the new duty station would bar receipt of a temporary quarters allowance nor did the relocation brochure Petitioner was provided (Finding [1] 4). (F-15 Handbook; Tr. 51-52, 83, 102, 187-190). None of the relocation forms given Petitioner to complete required that she notify Respondent that she owned a home at the new duty station (Tr. 58, 79).

IMPORTANT: If, at any time, you move your household goods into the temporary quarters, the reimbursable expenses discussed previously are terminated.

(F-15 Handbook, pp. 25, 29) (emphasis in original).

8. In 2005, Respondent revised the F-15 Handbook, adopting an approach to temporary quarters awards under which Respondent calculated a lump sum figure that would be paid to the employee in advance of relocation. For an employee who owned her own home at the old duty station, the lump sum temporary quarters allowance was calculated based on 60 days of the standard rate for lodging and per diem authorized federal travelers by the General Services Administration ("GSA") for the new duty location. (Postal Bulletin 22159 (July 21, 2005), p. 39; Tr. 27-29, 131).

9. On February 4, 2008, Petitioner signed the PS Form 178 authorizing her relocation

benefits (Finding 5). The form included a Relocation Agreement in which she agreed:

1. In consideration of my receiving the benefits provided by Handbook F-15, *Travel and Relocation*, as applicable, I hereby agree to report to my newly assigned duty station and to remain in the USPS and at my newly assigned duty station for a period of twelve (12) months following the effective date of my transfer. I understand the effective date of my transfer to be the date I reported for duty at my new official station.

2. I understand and agree that if I violate this agreement, all money paid to me and to third parties by the USPS as benefits in connection with my transfer shall be recoverable from me as a debt due to the USPS.

* * *

4. I have read the appropriate sections of Handbook F-15, as applicable, relating to relocation benefits.

(Resp. Exh. 13).

10. The F-15 Handbook cautioned an employee receiving relocation benefits, "If you

decline to accept or complete your relocation, or you do not complete the 12-month commitment, you must pay back all relocation expenses that the Postal Service incurred for your relocation benefits. . . ." (F-15 Handbook, p. 9).

11. Relocating employees were required by the F-15 Handbook to "[a]void unnecessary

expenses." (F-15 Handbook, p. 5).

12. Petitioner received a \$15,210 lump sum payment consisting of \$2,272 for a house

3. The F-15 Handbook in effect at the time of Petitioner's move was the December 22, 2000 edition, revised as of March 25, 2002, and July 1, 2005 (hereinafter referred to as the "F-15 Handbook") (Tr. 25-26).

4. On February 1, 2008, a Postal Service relocation coordinator sent Petitioner a brochure describing available relocation benefits. She advised Petitioner where the F-15 Handbook could be accessed on the internet, but noted, "HQ is in the process of revising the F-15 for relocation." The relocation brochure identified the information it provided as general information and pointed out that "Handbook F-15 provides detailed information." (F-15 Handbook; Postal Bulletin 22159 (July 21, 2005); Pet. Exh. 4, pp. 1-12).

5. The relocation benefits to be afforded Petitioner were listed on PS Form 178, *Specific Travel Order – Relocation and Relocation Agreement*, and included a temporary quarters allowance for her move from Denver to San Diego. The Form 178 identified March 31, 2008, as Petitioner's date to report to her new duty station. (Respondent's Exhibit ("Resp. Exh.") 13 (PS Form 178 (Interim), December 2000); Tr. 195).

6. The temporary quarters allowance authorized by the F-15 Handbook provided a lump sum amount to compensate a relocating employee for subsistence expenses while living in temporary quarters. These expenses consist of commercial lodging, meals, laundry, and dry-cleaning. The policy granting the benefit recognizes that while living in temporary quarters, the employee will not have available cooking and laundry facilities and thus will incur extra costs for lodging, restaurant meals, and laundry. (F-15 Handbook, p. 25; Tr. 33, 88-89).

7. The F-15 Handbook defined temporary quarters as follows:

Definition

Temporary quarters refer to any lodging obtained from commercial sources that you and your immediate family occupy for a temporary amount of time. This is a temporary solution for housing until you can move into a permanent residence. Quarters are not considered temporary if your lease is for more than 60 days.

* * *

BE AWARE that if you move your household goods into your temporary quarters, your housing is no longer considered temporary, and your expenses will not be reimbursed.

The admonition regarding household goods was repeated a few pages later:

February 8, 2012

In the Matter of the Petition by

MARGARET L. SMITH

at

San Clemente, CA

P.S. Docket No. AO 11-151

APPEARANCE FOR PETITIONER:

Margaret L. Smith

APPEARANCE FOR RESPONDENT:

Tom Cloonan

Labor Relations Specialist
United States Postal Service**INITIAL DECISION**

As a result of Petitioner Margaret L. Smith's relocation to a new duty station,

Respondent, United States Postal Service, paid her a temporary quarters allowance. Upon

learning, two-and-one-half years later, that Petitioner had moved with her household furnishings

into a house she owned at the new duty station, Respondent demanded that she repay the

temporary quarters allowance. By then Petitioner had retired, and she filed a Petition for

Review under 39 C.F.R. Part 966, *Rules of Practice in Proceedings Relative to Administrative*

Offsets Initiated Against Former Employees of the Postal Service.

A hearing was held in San Diego, and the parties submitted documents and written

argument. The following findings of fact are made based on the documents submitted and the

testimony at the hearing.

FINDINGS OF FACT

1. In 2008, Petitioner was employed as an Operations Support Specialist in

Respondent's Western Area Office in Denver (Petitioner's Exhibit ("Pet. Exh.") 1, p. 8).

2. She accepted a similar job in the Pacific Area Office in San Diego, a lateral transfer

that included payment to Petitioner of relocation benefits pursuant to Respondent's F-15

Handbook (Pet. Exh. 4, pp. 1-4; Hearing Transcript, page ("Tr.") 171).

that "the agency will rescind the 'Notice of Involuntary Administrative Salary Offsets' for the invoice #701540792 in the amount of \$226.14, and absolve the claimant of the debt."

As Respondent admits applicability of the Three Year Policy to this debt, Petitioner is entitled to entry of judgment in her favor.^[1]

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

[1]

In a telephone conference on January 30, 2012, Respondent's representative reiterated the position of the Postal Service that the debt at issue will not be collected under the Three Year Policy.

February 8, 2012

In the Matter of the Petition by

JACQUELYN M. DANIEL

at

Antioch, CA

P.S. Docket No. DCA 11-342

APPEARANCE FOR PETITIONER:

Jacquelyn M. Daniel

APPEARANCE FOR RESPONDENT:

Mayon M. Sespene

Labor Relations Representative

United States Postal Service

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, Jacquelyn Daniel, filed a Debt Collection Act Petition on December 19,

2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in

the amount of \$226,14 alleging that Petitioner received a salary overpayment in the pay

periods encompassing the dates between December 18, 2000, through December 31, 2000.

A Notice of Involuntary Administrative Salary Offsets was issued by Respondent on December

8, 2011. The Debt Collection Act Petition was timely filed.

On January 6, 2012, Respondent filed an *Answer* to the Debt Collection Act Petition in

which Respondent cited the "3 year write off rule (sic)" (Respondent's Exhibits 1 and 2). The

Three Year Policy, dated April 29, 2002, states that the Accounting Service Center would no

longer establish account receivables on salary overpayments "applicable to administrative

errors" that occurred "three or more years prior to the time the error was corrected."

Respondent's Exh. 1; see also, *Nancy Pettit*, P.S. Docket No. DCA 09-449 (April 30, 2010)

("Three Year Policy" applied to outstanding salary overpayment to relieve Petitioner of

otherwise valid debt). In recognition of the Three Year Policy, Respondent stated in its *Answer*

Petitioner argues that she saved Respondent money by moving her household furnishings into her San Diego house because she would have been entitled to store them at Respondent's expense. She suggests that she was thus in compliance with the requirement in the F-15 Handbook that she avoid unnecessary expenses (Finding 11). The purpose of the temporary quarters allowance is to defray lodging, meal, and incidental expenses associated with being in temporary housing. That under different facts Respondent's cost of Petitioner's relocation might have been less is irrelevant.

Respondent's Right to Recover the Temporary Quarters Allowance

Petitioner argues that the F-15 Handbook and her Relocation Agreement allow Respondent to recover the benefit in only two situations: (1) if she failed to relocate or (2) if she failed to stay in the new position for 12 months (Findings 9, 10). Since she met both of those requirements, she contends there is no basis for requiring her to repay the temporary quarters allowance she received.

Specific reference to two situations in which the employee may be required to repay relocation benefits does not preclude Respondent's recovery where, as here, Petitioner was not entitled to the temporary quarters allowance under Postal Service regulations. As the benefit was paid to her erroneously, she acquired no right to keep the funds. See *DiSilvestro v. United States*, 405 F.2d 150, 155 (2d Cir. 1968). Accordingly, Petitioner is indebted to Respondent in the amount of the erroneously paid relocation benefit. See *Raymond J. Voisine*, P.S. Docket No. DCA 95-22 (March 21, 1995).

Respondent's Withholding of Funds Owed Petitioner

Petitioner complains that Respondent failed to advise her of her right to petition for a hearing under 39 C.F.R. Part 966, *Rules of Practice in Proceedings Relative to Administrative Offsets Initiated against Former Employees of the Postal Service*, before withholding her pay-for-performance bonus and deducting from her May 1, 2011 annuity payment (Findings 31-40). Respondent's administrative offset regulations contemplate that an action to collect for a debt attributed to a former employee will be initiated by a demand from the Eagan Accounting Service Center offering an opportunity for the former employee to obtain reconsideration by her

former installation head. 39 C.F.R. §966.4. In this case, the claim for reimbursement of the temporary quarters allowance was initiated by Petitioner's former manager, but it did offer her an opportunity for reconsideration (Finding 28). Petitioner requested and received reconsideration of the alleged debt; her former manager denied her claim of entitlement to the temporary quarters allowance and advised her of her right to file a petition to challenge the involuntary collection under the applicable rules of Part 966 (Finding 29, 31). Petitioner timely filed a petition for a hearing (Finding 35). Respondent initiated withholding from Petitioner's annuity in violation of 39 C.F.R. §966.5, which provides that a timely filed petition stays further collection action, but such withholdings have been refunded to Petitioner (Findings 34, 38, 39, 40).

In this proceeding, Petitioner submitted documents in support of her position, and an oral hearing was held in which she and other witnesses she requested testified. She had an opportunity to confront and cross examine Respondent's witnesses. She was provided copies of the documents Respondent relied on as a basis for the claimed debt. After being provided a copy of the transcript, both parties submitted written argument and supplementary evidence. This process provided a fair and reasonable opportunity for Petitioner to challenge the debt claimed by Respondent. The withholdings improperly made after this matter was docketed (but now refunded) did not prejudice her ability to challenge the debt at issue and do not provide a basis for relieving her of all or part of the debt.

Other Federal Relocation Decisions

The Civilian Board of Contract Appeals ("CBCA") considers relocation issues for federal employees other than Postal Service employees, applying the Federal Travel Regulation ("FTR"). In determining whether a relocating employee occupies temporary quarters, entitling her to a temporary quarters allowance, the FTR provides:

In determining whether quarters are temporary, the agency should consider factors such as the duration of the lease, movement of household effects into the quarters, the type of quarters, the employee's expressions of intent, attempts to secure a permanent dwelling, and the length of time the employee occupies the quarters.

41 CFR 302-5.305.

Petitioner argues that she should be entitled to the temporary quarters allowance because she always intended that her San Diego house would be a temporary residence, citing a number of CBCA decisions. She points out that throughout the two-and-one-half years of her occupancy she continued to look for other houses to buy (Finding 21) as evidence that she considered the San Diego house only a temporary residence.

Respondent argues correctly that the FTR does not apply to the Postal Service, 39 U.S.C. §410, and that the F-15 Handbook governs Petitioner's relocation. Accordingly, other agency decisions addressing relocation under the FTR are not binding in this proceeding, although their reasoning may have some helpful application in resolving Postal Service relocation issues. Nevertheless, I am not persuaded that applying the FTR standards would result in a different outcome in this case.

In *Juan G. Bernal*, CBCA 1648-RELO, December 3, 2009, an employee was found not entitled to a temporary quarters allowance because he had entered a lease for one year with no provision for breaking it early, had received all of his household furnishings when he moved in, and at the time the claim was under consideration he had been in the leased house for 9 months. Here Petitioner moved into a house she owned, received all her household furnishings when she moved in, and stayed in the house for two-and-one-half years. Petitioner's simple expressions of intent to occupy the San Diego house temporarily in the face of actions to the contrary will not suffice to prove the lodging temporary. *Id.* [7]

In a decision by the General Services Administration Board of Contract Appeals, which decided relocation claim cases before the 2007 creation of the CBCA, the judge addressed a claim for the meals and incidentals portion of a temporary quarters allowance of a relocating employee who moved into a furnished home he owned at the new duty station. The judge noted that the temporary quarters allowance serves to reimburse an employee reasonably and equitably for subsistence expenses incurred when it is necessary for the employee to occupy temporary lodging and denied the claim: "Because [the employee] occupied his own residence at the new duty station immediately upon reporting for duty, and had furnishings available for

his use, he was never eligible to receive [a temporary quarters allowance]." Donald D.

Filthian, Jr., GSBCA No. 16712-RELO, 06-1 BCA ¶ 33,204.

Petitioner's claim of entitlement to a temporary quarters allowance would likely fare no

better under the FTR standard.

Conclusion

The Petition is denied. Respondent is entitled to recover the amount of the temporary

quarters allowance, \$12,938. It may retain the funds previously collected (\$5,148.76 (Finding

41)) and recover the uncollected amount, \$7,789.24, by offset against moneys owed Petitioner,

including her retirement annuity.

Norman D. Menegat
Administrative Judge

[1]

A subsequent revision of Respondent's relocation regulation provided, "If you own or lease a home in the new duty station that will become your principal residence, relocation benefits will be limited." (F-15-A Handbook, *Relocation Policy - Nonbargaining Executive and Administrative Schedule (EAS) Employees*, August 2010, Section 247; see Pat. Exh. 6).

[2]

In an August 27, 2009 email regarding her search for a house, Petitioner wrote to a friend, "I have no problem rehabbing if the payback is worth it. Depending on the property, I would live in it (rent out my place), rent it or resell . . ." (Resp. Exh. 19 (p. 3), Tr. 212).

[3]

The annuity withholdings made on June 1 and July 1, 2011, have been reimbursed to Petitioner (Findings 36, 38, 39, 40).

[4]

Petitioner argued that the inclusion in a later edition of Respondent's relocation regulation of a statement that moving into an owned home at the new duty station would limit relocation benefits (Finding 16, fn. 1) demonstrates that the F-15 applicable to her move did not include such a limit. However, the language of the applicable F-15 Handbook addresses Petitioner's exact circumstance and bars her recovery of a temporary quarters allowance because she at all times had her household furnishings available to her. (Finding 6). That a later statement of the relocation policy might have focused more directly on ownership of the home does not change the limitations of the applicable F-15 Handbook.

[5]

Petitioner argues that she was entitled to a temporary quarters allowance at least until May 6, 2008, when Respondent bought her Denver home (Finding 20), because she was bearing the expenses of two households. However, incurring overlapping costs of home ownership does not entitle her to a temporary quarters allowance. Moreover, she was incurring the same double housing costs before she moved.

[6]

Petitioner argues that the Cartus representative's statement that the lump sum was to be used at Petitioner's discretion (Finding 13) authorized her receipt and use of the temporary quarters allowance. That statement only identified the lump sum nature of the temporary quarters allowance and did not signify that Petitioner had discretion to keep a lump sum benefit to which she was not entitled. The Cartus representative had no authority to grant a benefit Petitioner did not qualify for under the F-15 Handbook (Finding 14).

[7]

Additionally, a comment Petitioner made in the course of looking for another house undercuts her insistence that she intended the San Diego house to be a temporary residence while she searched for another house to be her permanent residence. In an email communication with a friend regarding her search for a house in 2009, Petitioner commented, "I have no problem rehabbing if the payback is worth it. Depending on the property, I would live in it (rent out my place), rent it or resell . . ." (Finding 21, fn. 2). This suggests an investment motivation rather than an overriding interest in finding a permanent residence.

September 7, 2011

Appeals of

STEWARTSVILLE POSTAL PROPERTIES

LEASE AGREEMENT

PSBCA Nos. 6377, 6382 and 6394

APPEARANCE FOR APPELLANT

Dennis J. Francis, Esq.

APPEARANCE FOR RESPONDENT

Barbara H. Cioffi, Esq.

OPINION OF THE BOARD
ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

[1]

Respondent moves for partial summary judgment, asserting that the Board's dismissal with prejudice of a prior appeal involving the underlying subject matter renders final the contracting officer's decision that Appellant is responsible under the lease for snow removal. Respondent maintains that entitlement therefore is established in its favor based on res judicata, leaving only quantum for the Board to address in these appeals.

We grant Respondent's motion because the statutory period for Appellant to appeal the contracting officer's decision involved in the previously dismissed case has expired. Accordingly, we find that matter, that snow removal was Appellant's obligation under the lease, to be resolved with finality and to be unreviewable. The scope and meaning of that responsibility, as well as quantum issues however, remain for the Board to address in these appeals.

The following findings of fact are determined solely for purposes of resolving this motion.

FINDINGS OF FACT

1. On March 26, 2008, the parties entered into a lease under which Appellant, Stewartsville Postal Properties, LLC, constructed the Stewartsville, New Jersey Main Post

Office (Stewartsville MPO), and leased it to Respondent, U.S. Postal Service (Appeal File Tab

(AF) 1).

2. General Condition 8, *Claims and Disputes*, of the lease provides, at subsection

(c),

"Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract.

(AF 1 at 7).

3. As reflected in a series of communications between the parties in December

2009, a dispute arose as to whether the provisions of a "Utilities, Service and Equipment

Rider" that was listed in the lease under a paragraph entitled "Other Provisions" was actually

part of the lease. Appellant contended that two pages that contained the actual language of

the Rider were not physically present in the lease that the parties executed and, therefore,

were not legally part of the lease. Among the disputed Rider provisions was a paragraph

requiring the lessor to provide snow removal services at the Stewartsville MPO. Respondent's

personnel took the position that Appellant was obligated under the lease to provide those

services. (AF 4-5; compare AF 5 at 83, AF 7 and AF 12 with AF 6 and AF 8; see also

Complaint and Answer ¶¶ 12-14).

4. During the winter of 2009-2010, Appellant refused to provide snow removal

services at the Stewartsville MPO, and the Stewartsville Postmaster arranged for the services

to be provided by a contractor. In a February 18, 2010 letter to Appellant, Respondent's Real

Estate Specialist stated his opinion that Appellant was responsible under the lease for snow

removal, and that he expected Appellant to reimburse the Postal Service for the funds it had

expended. (AF 4-6).

5. In response to the Real Estate Specialist's letter, Appellant sent an undated

letter to Respondent setting out its position in detail. In addition to arguing that the Rider was

not part of the lease at all, Appellant also identified questions regarding interpreting the Rider's

language. Appellant referred to its letter as a claim, and requested a final decision on the

matter. (AF 7 at 87).

6. On June 3, 2010, Respondent's contracting officer issued a final decision in which he stated that he was responding to Appellant's claim concerning snow removal responsibility, referenced in Finding 5. The decision analyzed which version of the lease controlled (with or without the Rider that included the snow removal provision). The final decision concluded,

Given the above it is my determination that you, as landlord, have responsibility for snow removal under the terms of the lease . . .

(AF 8).

7. While the contracting officer's decision concluded that snow removal was Appellant's responsibility under the lease, it did not respond to Appellant's questions about the scope of that snow removal responsibility or otherwise interpret that provision. The contracting officer's decision included language advising Appellant of its appeal rights. (AF 8; see 39 CFR § 601.109 (g)(7-8)).

8. On September 1, 2010, Appellant's principal transmitted a letter to the contracting officer denoted as "a formal notice of appeal" of the final decision, and designating "this Notice of Appeal as a Complaint." (AF 9).

9. Respondent's counsel forwarded Appellant's notice of appeal to the Board, and the appeal was docketed as PSBCA No. 6350. On October 29, 2010, Appellant's counsel filed a notice of appearance.

10. In a letter to the Board dated December 10, 2010, Appellant's counsel stated, In reference to the above captioned matter, as you are aware my office represents the Appellant, Stewartsville Postal Properties, LLC. After consultation with my client please accept this letter as a formal withdrawal of Appellant's appeal under PSBCA No. 6350.

11. On December 20, 2010, the Board issued an *Order* in PSBCA No. 6350, as follows,

Appellant's counsel has filed a letter withdrawing this appeal. Appellant is advised that such a withdrawal will result in dismissal of the appeal with prejudice. If Appellant has any objection to such a result, it must notify the Board in writing no later than January 7, 2011. (Emphasis in original).

Appellant's counsel received the *Order* on December 28, 2010.

12. The Board did not receive a response to the *Order* referenced in Finding 11.
13. On January 19, 2011, the Board dismissed PSBCA No. 6350 with prejudice.

The Dismissal provided,

Appellant submitted a letter dated December 10, 2010, withdrawing this appeal. On December 20, 2010, the Board issued an Order advising Appellant that such a withdrawal would result in dismissal of the appeal with prejudice. That Order allowed Appellant until January 7, 2011, to object to such a dismissal. No objection having been received, this appeal is dismissed with prejudice.

(AF 10).

14. On February 17, 2011, Respondent's contracting officer issued a decision assessing Appellant \$3,196.20 for snow removal costs that Respondent incurred at the Stewartsville MPO. The contracting officer indicated that Respondent intended to deduct that amount from the March rent otherwise due Appellant. Regarding responsibility for snow removal, the contracting officer's decision stated,

On June 3, 2010[,] I issued a final decision letter to you regarding snow removal at the Stewartsville, NJ Post Office. In that letter I stated that under the terms of your Lease with the Postal Service you have responsibility for snow removal at the facility. A copy of that letter is attached. You did not fully pursue an appeal to challenge my decision that you are liable for snow removal under the Lease and the time to do so has expired. As such, my final decision on liability is now binding.

(AF 14).

15. Appellant timely appealed the contracting officer's decision (AF 15). The appeal was docketed as PSBCA No. 6377.

16. On March 31, 2011, Respondent's contracting officer issued another decision, assessing Appellant \$1,548.75 for additional snow removal costs, to be deducted from the April rent. The contracting officer's decision included the same paragraph recited in Finding 14. (AF 17).

17. Appellant timely appealed this decision. The appeal was docketed as PSBCA No. 6382, and the appeals were consolidated (May 13, 2011 *Order*).

18. On June 16, 2011, Respondent's contracting officer issued another decision, assessing Appellant \$1,638.75 for additional snow removal costs, to be deducted from the

June rent. The contracting officer's decision included the same paragraph recited in Finding 14.

19. Appellant timely appealed this decision. The appeal was docketed as PSBCA No. 6394, and the appeals were consolidated (June 30, 2011 *Order*).

20. Respondent's Answer raised *res judicata* as an affirmative defense (Answer at 4), and a briefing schedule was established to address the issue (*Order and Memorandum of Telephone Conference*, April 28, 2011). Respondent's motion, captioned *Respondent's Legal Brief On the Res Judicata Effect of June 3, 2010 CO Final Decision Letter*, was received by the Board on May 11, 2011, and construed to apply to the consolidated appeals (May 13, 2011 *Order*; June 30, 2011 *Order*). Appellant did not respond to the motion (June 17, 2011 *Order*).

DECISION

Respondent argues that the Board's dismissal with prejudice of PSBCA No. 6350 requires that we rule that the question there at issue which was addressed by the contracting officer has been resolved in its favor. Respondent argues that Appellant therefore is precluded from contesting entitlement in the present appeals due to *res judicata*. It concludes that as a result, the Board need only determine in these appeals whether the costs incurred by Respondent were reasonable.

[2]
Appellant did not respond to the motion (Finding 20). In the absence of explanation by Appellant, we consider, and ultimately accept an argument presented in Respondent's motion, that the denied claim appealed in PSBCA No. 6350 was cognizable as a claim under

[3]
the Contract Disputes Act (CDA). The CDA itself does not define a claim. However, Federal Circuit precedent obliges us to consider the term "claim" broadly. See *Todd Construction, L.P. v. United States*, ___ F.3d ___, 2011 WL 3796259 (Fed. Cir., August 29, 2011). We examine applicable regulations implementing the CDA, the language of the contract, and the facts of the case to decide whether an appeal of a cognizable claim was at issue in PSBCA No. 6350. See *Garrett v. General Electric, Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993).

[4]
Regulations implementing the CDA for Postal Service contracts do not address the

definition of a claim. See 39 CFR § 601.109. However, the lease's Claims and Disputes

clause implementing the CDA (Finding 2) provides the definition. Utilizing that definition, we

determine that Appellant's letter, which Appellant itself designated as a claim, which expressly

requested a contracting officer's decision (Finding 5), and which sought interpretation of the

[5]

lease (Finding 2) constituted a CDA claim. See *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1267 (Fed. Cir. 1999).

The contracting officer's response, that Appellant "as landlord, [has] responsibility for

snow removal under the terms of the lease," (Finding 6), was unequivocal in interpreting the

lease responsibilities. This falls within the ambit of a cognizable claim and contracting officer

decision appealable under the CDA. See *Alliant Techsystems*, 178 F.3d at 1265 (contracting

officer determination rejecting contractors' position concerning validity of government exercise

of an option); see also *Kaman Precision Products, Inc.*, ASBCA No. 56305, 10-2 BCA ¶ 34,529

(nonmonetary contract interpretation question whether contractor obliged to perform at all is

within Board's CDA jurisdiction); *N.J. Hasterer*, PSBCA No. 3064, 92-3 BCA ¶ 25,189

(nonmonetary claim to determine lease obligations of the parties within Board's jurisdiction);

Greater Eastern Holding Co., PSBCA No. 1128, 83-2 BCA ¶ 16,784 (nonmonetary claim to

determine continuing responsibility for roof repairs under a lease within Board's jurisdiction).

Accordingly, the contracting officer's June 3, 2010 decision must be appealed within 90

days for the Board to possess jurisdiction to address its merits, or within 12 months to vest

jurisdiction with the United States Court of Federal Claims. 41 USC § 7104. Failure to appeal

or file suit within those time frames results in the contracting officer's decision becoming final,

conclusive and not subject to review in any forum. 41 USC § 7103(g). Under the facts of this

case, once the appeal of that final decision in PSBCA No. 6350 was dismissed, for purposes of

timeliness, it was as if the appeal never were brought. See *Charles G. Williams Construction, Inc.*, ASBCA Nos. 51329, 51637, 99-2 BCA ¶ 30,409. As recognized in the contracting

officer's monetary decisions (Finding 14), the time for challenging before the Board that now-

final and unappealable CDA decision is past. We find the matter addressed in the contracting

[6]

officer's June 3, 2010 decision resolved.

Accordingly, snow removal is Appellant's obligation under the lease. Proceedings concerning the remaining aspects of these appeals, involving the scope of that responsibility and damages issues, will be addressed by separate Order.

CONCLUSION

Respondent's motion for partial summary judgment is granted.

Gary E. Shapiro
Administrative Judge
Board Member

I concur

William A. Campbell
Administrative Judge
Chairman

David I. Brochstein
Vice Chairman
Administrative Judge

[1] Because Respondent's motion addresses the merits of these appeals, we construe it as one for partial summary judgment. See *J. Leonard Spodek, Nationwide Postal Management*, PSBCA No. 4351, 00-1 BCA ¶ 30,681, at 151,519 n.1.

[2] Nor did Appellant respond to the Board's December 20, 2010 warning that withdrawal of PSBCA No. 6350 would result in dismissal with prejudice (Findings 11-13). At the time of Appellant's withdrawal request and the Board's warning, the 90-day appeal period had expired.

[3] Had we concluded to the contrary – that the denied claim was not cognizable as a CDA claim, the statutory appeal period would not have begun, and so, could not be expired. Similarly, there could not have been a viable appeal before the Board when PSBCA No. 6350 was dismissed, and the dismissal could not have resulted in any preclusive effect. See *Do-Well Machine Shop, Inc.*, 870 F.2d 637, 639-40 (Fed. Cir. 1989).

[4] The Federal Acquisition Regulations, which include a definition of a claim for CDA purposes, see *Garrett*, 987 F.2d at 749, do not apply to the Postal Service. See *Zobe, LLC*, PSBCA Nos. 6239, 6244, 6245, 10-1 BCA ¶ 34,342.

[5] We express no opinion as to whether the contracting officer's decision would have been viable under the CDA in the absence of Appellant's claim requesting it be decided.

[6] Accordingly, we need not address Respondent's res judicata argument.

January 12, 2012

In the Matter of the Petition by

JAMES SCANNAPIECO

at

Parkside, PA

P.S. Docket No. DCA 11-277

APPEARANCE FOR PETITIONER:

Albert E. Lum

Scialla Associates, Inc.

APPEARANCE FOR RESPONDENT:

Joseph M. Belluso

Labor Relations Specialist United States Postal Service

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

Petitioner, James Scannapieco, filed a Petition for Hearing on September 19, 2011. Respondent, United States Postal Service, sought to collect from Petitioner a debt in the amount of \$2,138.23.

On January 9, 2012, the parties submitted a *Settlement Agreement* in which Respondent rescinds the Notice of Involuntary Administrative Salary Offsets. Respondent also relieved Petitioner of any responsibility for the debt at issue in this Petition. This is an admission on the merits of the Petition by Respondent. Although the parties request a dismissal of the Petition, the appropriate action is to issue a Decision in favor of Petitioner.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

January 23, 2012

In the Matter of the Petition by

CARMEN VILLARREAL
at

Mechanicsville, VA

P.S. Docket No. AO 11-208

APPEARANCE FOR PETITIONER
CARMEN VILLARREAL:
Albert E. Lum
Scialla Associates, Inc.

APPEARANCE FOR RESPONDENT:
PAULA K. ARMATIS:
Labor Relations Specialist
United States Postal Service

INITIAL DECISION

Petitioner, Carmen Villarreal, filed a Debt Collection Act Petition after having received a Notice of Involuntary Administrative Salary Offsets from Respondent, United States Postal Service. The Notice asserted Respondent's intention to collect \$49,982.57 from Petitioner by administrative offset to recover a stamp stock shortage in a unit reserve account for which Petitioner had been accountable custodian. Following Petitioner's retirement, I converted the Petition to one addressed under 39 CFR Part 966, *Rules of Practice in Proceedings Relative to Administrative Offsets Initiated Against Former Employees of the Postal Service*.

I presided at a hearing in Richmond, Virginia, in which six witnesses testified, including Petitioner. This Initial Decision finds in Respondent's favor, and I conclude that it is entitled to recover by administrative offset the full amount of the debt sought from Petitioner.

FINDINGS OF FACT

1. Petitioner was the customer service manager for a post office known as the West End Station in Richmond, Virginia. She served as that station's accountable unit reserve custodian since 2002. (Hearing Transcript (Tr.) 21, 66-67, 164-65).
2. During the relevant time, custodians in Petitioner's district were required to count

their unit reserve accounts every three months (Tr. 14, 62-63). The corresponding retail account should be counted if the unit reserve were found to be out of allowable tolerance (Tr.

14, 162).

3. Respondent periodically entrusted Petitioner with additional accountability duties

due to her reputation as a good record-keeper without unit reserve shortages (Tr. 14-15, 37, 43, 180). Prior to recorded counts in April 2010, Petitioner's unit reserve consistently demonstrated either a perfect balance between stock on hand and the amount reflected in the computer system (Respondent's Exhibit (R. Ex.) 9; Tr. 15, 52), or small shortages or overages within expected tolerances (Tr. 182). Petitioner retained exclusive access to the safes in which the unit reserve stock was secured (Tr. 110-12, 120).

4. As part of her unit reserve custodian duties, Petitioner prepared and retained a

[1]

box of non-saleable stamps for several years (Petitioner's Exhibits 1-9; Tr. 166-74, 181). This box of stamps, referred to as the unit redeemed, was kept in locked safes as part of the station's unit reserve. Petitioner intended to send the unit redeemed box to the Stamp

Distribution Office (SDO) for destruction (Tr. 187, 192, 194, 196).

5. On April 20, 2010, Petitioner input a unit reserve count for that day into the postal

accounting system, reflecting a \$116,430 overage. Petitioner believed that the system count, her physical count, and the resulting overage to have been accurate and inclusive of the unit redeemed stock (R. Ex. 9; 28; Tr. 18-19, 23, 175, 182, 195). Count sheets were not maintained (Tr. 86-87, 144). The station's retail floor stock was counted that day revealing a \$2,735.79

overage (R. Exs. 8, 28; Tr. 23).

6. On April 26 and 27, Petitioner sent several large shipments of non-saleable

stamps from the unit redeemed to the SDO for destruction (R. Exs. 14-24; Tr. 197, 202-03).

The values of these shipments were deducted from the unit reserve accountability (R. Exs. 14-

24; Tr. 198-203; see also Tr. 28-30, 34, 59-60, 214).

7. Petitioner did not return to work after April 28, 2010, due to medical leave.

Petitioner testified that this medical leave was unexpected. Petitioner thereafter retired after

having remained on medical leave for over fifteen months. (R. Ex. 32, at p. 35; Tr. 152-53, 157-

58, 165, 184-85, 193-94).

8. On May 7, 2010, the unit reserve was audited by two counters incident to a transfer of the accountability necessitated by Petitioner's absence. The audit was performed by Petitioner's replacement as customer service manager and by the station's lead sales service clerk, who also was Petitioner's designee for these purposes. The audit revealed a \$65,726.01 shortage. (R. Exs. 11-13; Tr. 20, 43-47, 80-81, 85, 201).

9. The May 7 audit was conducted properly and is accurate (Tr. 49, 83-85, 128). At the conclusion of the May 7 audit, custodian responsibility for the unit reserve was transferred from Petitioner (Tr. 185).

10. An official from the National Association of Postal Supervisors (NAPS), representing Petitioner, also was present at the May 7 audit (Tr. 48-49, 84, 124-25). The NAPS representative agreed that the audit was properly conducted and that the result was accurate (Tr. 49, 84, 128).

11. Unit reserve custodians are required to maintain a secured envelope in the post office which identifies the custodian's designee to access the unit reserve safes in the custodian's absence, and provides the key or combination to the lock and accounting system password information (Tr. 47-48). However, Petitioner did not maintain that secured envelope (Tr. 111-12).

12. In order to obtain access to the locked unit reserve safes in the absence of the secured enveloped referenced in Finding 11, a maintenance employee drilled open the locks. He did so in the presence of the counters and Petitioner's NAPS representative. (Tr. 80-81, 97, 111-12, 126-27). Petitioner was offered the opportunity to be present at the May 7 audit but she did not attend (Tr. 111, 125, 177, 194).

13. The station's retail unit was not counted on May 7 (Tr. 110, 135, 160), as it should have been once the unit reserve shortage was discovered on that date (Tr. 162; *cf.* Resp. Ex. 35 at p. 12 (Handbook F-101, § 13-4)).

14. The first unit reserve audit conducted subsequent to May 7 revealed a balanced account (Tr. 99).

15. On June 2, 2010, Respondent reduced its assessment of Petitioner's accountability for the unit reserve shortage from \$65,726.01 to \$62,843.81. The reduction was based on offsetting the \$2,735.79 retail count overage that Petitioner identified on April 20, and on a series of adjustments reflecting retail overages and shortages from 2006 to 2010. Respondent issued a \$62,843.81 demand letter to Petitioner on the same date. (R. Exs. 7-8; Tr. 68, 139-40). Petitioner sought reconsideration of the assessment (R. Ex. 6).

16. Respondent subsequently reduced the debt assessment by an additional \$12,861.24, from \$62,843.81 to \$49,982.57. This second reduction was based on a retail unit overage discovered in a July 2010 count (Tr. 141, 160). Although none of the overages were shown to correlate directly with the unit reserve shortage, all were used to offset the asserted indebtedness (R. Ex. 4; Tr. 74-6, 139-44, 160, 162).

17. Respondent inappropriately began offsetting Petitioner's salary before it had issued her a Notice of Involuntary Administrative Salary Offsets, as required. Petitioner's resulting Petition was docketed as a Debt Collection Act action, and I ordered Respondent to cease its collection efforts and refund money it had offset. Respondent complied, and I suspended this case.

18. On August 5, 2011, Respondent issued Petitioner a Notice of Involuntary Administrative Salary Offsets for \$49,982.57 (R. Ex. 2; Tr. 73-75, 144). Because Petitioner had retired in the interim, I activated the Petition as one utilizing the Administrative Offsets procedures of 39 CFR Part 966.

19. Petitioner concedes, without elaboration, that she is responsible for \$2,836.36 of the shortage (Tr. 11, 189).

DECISION

To recover in this case, Respondent must show that Petitioner was the accountable custodian of the unit reserve at issue, and that a stock shortage representing an actual loss existed after a properly conducted inventory or audit of Petitioner's unit reserve account. However, Respondent is not required to prove any specific misdeed or act of negligence by Petitioner. If Respondent satisfies this initial burden, Petitioner can be held personally liable for

the unit reserve shortage that occurred while she was accountable custodian unless circumstances are shown that should alleviate or offset that debt. Petitioner bears the burden to demonstrate such exonerating circumstances. *See Zeola H. Brady*, P.S. Docket No. DCA 10-190 (February 11, 2011).

The unit reserve system count against which the May 7 audit was measured was in balance (Findings 3, 5-6). Petitioner maintains that she conducted a proper count on April 20 inclusive of the unit redeemed, which showed a small overage (Finding 5). Respondent asserts that the April 20 count did not occur, that any resulting paperwork was fraudulent, and that, in any event, the unit reserve counts prior to April 20 showed a zero variance between the recorded balance and stock on hand in the unit reserve (Finding 3). Because the parties do not disagree that the unit reserve prior to May 7 was in balance, I need not resolve the factual conflict concerning the April 20 count.

Accordingly, Petitioner remained accountable until completion of the May 7 audit (Finding 9). There is no evidence that the unit reserve safes were compromised during that 18-day period. Petitioner retained exclusive, and indeed, unquestioned control over the unit reserve safes, and the locks needed to be drilled open for others to gain access (Findings 3, 11-12).

The May 7 audit was properly conducted, was accurate, and demonstrated the asserted shortage (Findings 8-10). Moreover, Respondent acted reasonably in investigating the shortage, and it offset all overages found in the retail unit against Petitioner's accountability even though the overages were not demonstrated to have been directly related to the shortage (Findings 15-16).

The record is devoid of details concerning the large retail unit overage discovered in July, which was used to offset the unit reserve shortage. However, Petitioner does not question the accuracy of that July retail count or claim that more should be offset because of it. Respondent erred in not counting the retail unit when the unit reserve shortage was discovered (Findings 2, 13). I need not resolve whether this failure to have performed concurrent counts alone might be sufficient to affect a unit reserve custodian's accountability in an appropriate case because in

this case Respondent credited Petitioner with overages discovered both in the retail count preceding the May 7 unit reserve audit and in the July 2010 retail unit count, which followed the May 7 unit reserve audit. Respondent's failure to have counted the retail unit on

May 7 therefore amounted to harmless error. Respondent has satisfied its initial burden that Petitioner is responsible in at least the amount sought for the unit reserve shortage that occurred while she was custodian.

The burden therefore shifts to Petitioner to demonstrate circumstances that should alleviate or offset the resulting debt. Petitioner presented two arguments in an effort to do so, both of which I reject as unproved.

First, Petitioner asserted that the system count for the May 7 audit was understated.

Specifically, on April 26 and 27, Petitioner sent the unit redeemed stock, that she had retained for years in the unit reserve, to the SDO then promptly left the post office permanently.

Petitioner maintains that the unit reserve accountability was not reduced as it should have been to reflect those transfers. However, Petitioner has not shown that any such SDO transfers were not reflected in the reduced accountability (Finding 6). Further, if an error had occurred in this regard, I would expect a corresponding overage to be identified in subsequent unit reserve audits. This did not occur (Finding 14). Moreover, to the extent Petitioner has not abandoned

an argument (as appears to be the case) that accumulated years-long accounting errors for the unit redeemed resulted in an inflated accountability, her position that the April 20 count she performed yielded an overage eliminates the viability of any such possibility.

Petitioner has offered no coherent or supported explanation reflecting that the unit

reserve account had an inaccurate amount in the accountability. In such circumstances, she remains liable for the assessed debt unless she can show that the count itself was flawed. See *Cinder Isreal*, P.S. Docket No. DCA 10-149 (October 14, 2010).

Petitioner's second argument attempts to do so by asserting that the May 7 auditors

failed to count the remaining unit redeemed stock. I reject that position as completely

unsupported. The unit redeemed was kept in the same safes with the unit reserve, and I have found the count, which was witnessed and agreed to by a NAPS representative, to be complete

and accurate (Findings 4, 8-10).

CONCLUSION

The Petition is denied. Respondent is permitted to collect \$49,982.57 from Petitioner by administrative offset.

Gary E. Shapiro
Administrative Judge

[1]

Petitioner has not explained why she did not transfer the unit redeemed stock for destruction during this time, as she did on April 26 and 27, 2010, as referenced in Finding 6.

[2]

Any other result in this case on this issue would be speculative, and it was not argued by Petitioner.

January 24, 2012

In the Matter of the Petitions by

STEPHEN J. TOPEL

at

Owings Mills, MD

P.S. Docket Nos. AO 10-164 and 165

APPEARANCE FOR PETITIONER:

Stephen J. Topel

APPEARANCE FOR RESPONDENT:

Sherri Garner

Labor Relations Specialist

United States Postal Service

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

On September 15, 2011, the undersigned received from Respondent's representative an *Answer* in which Respondent indicated that it would not pursue the debts that are the subject of these consolidated Debt Collection Act cases. I read Respondent's submission as an admission on the merits of the Petition.

On September 16, 2011, I issued an *Order to Show Cause* in the above consolidated Debt Collection Act cases, in which I stated my intention to issue a Decision in favor of Petitioner unless I received objection in writing from either party on or before September 30, 2011. No objection was received from either party. Accordingly, Petitioner is entitled to judgment in his favor.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

January 26, 2012

In the Matter of the Petition by

KAREN L. MAHON

at

College Park, MD

P.S. Docket No. DCA 11-242

APPEARANCE FOR PETITIONER:

Albert E. Lum
Scialla Associates, Inc.

APPEARANCE FOR RESPONDENT:

Anita O. Crews
Labor Relations Specialist
United States Postal Service

FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

On November 9, 2011, I issued an *Order to Show Cause* in which I stated my intent to issue a Decision in favor of Petitioner based upon Respondent's statements that it lacked sufficient evidence to prove the existence of the debt alleged in this matter. Both parties were invited to submit a written objection on or before November 18, 2011. No written objection was submitted by either party.

Accordingly, Petitioner is entitled to entry of judgment in her favor.

ORDER

The Petition is GRANTED. Respondent may not collect the debt by administrative offset from Petitioner's salary.

James G. Gilbert
Chief Administrative Law Judge

October 28, 2011

Appeals of

SUD FAMILY LIMITED PARTNERSHIP

LEASE AGREEMENT

PSBCA Nos. 6383 and 6390

APPEARANCE FOR APPELLANT

Suniti R. Sud, Esq.

APPEARANCE FOR RESPONDENT

Alfred J. Zwettler, Esq.

OPINION OF THE BOARD

Appellant, Sud Family Limited Partnership, appeals a decision by Respondent, United States Postal Service, to recover by rental offset costs expended to resolve fire code violations at a postal facility Appellant leases to Respondent. Appellant elected the Board's Small Claims (Expedited) Procedure, and has conceded entitlement. The parties have submitted this appeal on the record, pursuant to 39 CFR § 955.12. We rule in favor of Respondent, but not for the complete recovery it seeks.

FINDINGS OF FACT

1. In 1975, Appellant's predecessor in interest and Respondent entered into a lease for the Charlotte, North Carolina Processing and Distribution Center (P&DC) (Appeal File Tab (AF) 1). The lease was renewed and expires in 2015 (AF 2). Appellant succeeded to the lease in 2006 (Declaration of P. Lyne (Lyne Decl.) ¶ 2; August 2, 2011 Declaration of E. Tinort (Tinort I Decl.) ¶ 5).

2. The P&DC lease (AF 1) includes the following provisions:

The Lessor shall . . . maintain the demised premises, including the building and any and all equipment, fixtures and appurtenances, whether severable or non-severable, furnished by the Lessor under this lease, in good repair and tenantable condition. . . .

Lease, ¶ 11 (a).

When the need arises for maintenance or repair or for restoration to a condition suitable for the purpose for which leased, the Postal Service shall (except in emergencies) give

the Lessor written notice thereof, specifying a time for completion of the work which is reasonable and commensurate with the nature of the work required. If the Lessor . . . fails to prosecute the work with such diligence as will ensure its completion within the time specified in the written notice . . . or fails to complete the work within said time, the Postal Service shall have the right to perform the work, by contract or otherwise, and withhold the cost thereof from payments due or to become due under this lease . . .

Lease, ¶ 11 (c).

The Lessor shall, without additional expense to the Postal Service, be responsible for obtaining any necessary licenses and permits for privately owned buildings, and for complying with any applicable Federal, State, and municipal laws, codes and regulations . . .

Lease, ¶ 15 (a).

3. The P&DC is a two-story facility that includes a passenger elevator and a cargo elevator. Appellant replaced the passenger elevator, which remained out of service from July 2009 until September 2010. (Lyne Decl. ¶ 3; Tinort I Decl. ¶¶ 4, 6; Declaration of M. Legrand

(Legrand Decl.) ¶ 5).

4. The Charlotte Fire Department (Fire Department) inspected the newly replaced passenger elevator, and on December 15, 2010, issued an inspection report. The report

identified two fire code violations involving sprinkler head spacing and a fire alarm system (the Fire Department violations). Specifically, the inspection report concluded that sprinklers must be added in the machine room and elevator pit, and that smoke and heat detectors must be added in the elevator shaft. The inspection report identified separate \$50 fines if the violations remained when the Fire Department conducted its next inspection, scheduled for February 13, 2011 (AF 3, 5; Lyne Decl. ¶ 4; Tinort I Decl. ¶ 7; Declaration of K. Penland (Penland Decl.) ¶ 5; Legrand Decl. ¶ 5).

5. On December 22, 2010, Respondent sent a letter to Appellant requiring it to

resolve the Fire Department violations by February 1, 2011. The letter informed Appellant that failure to do so would result in Respondent performing the work and deducting the cost from Appellant's rent. (AF 4; Lyne Decl. ¶ 6). On January 5, 2011, Appellant assured Respondent that the Fire Department violations would be corrected by February 1 (AF 5; Lyne Decl. ¶ 9). On January 14, 2011, Respondent's contracting officer notified Appellant that if

the work to resolve the Fire Department violations were not begun by January 24, Respondent would take over the project (AF 7; Tinort I Decl. ¶ 10). Respondent believed that the January 24 deadline was necessary in order to have the work completed by the Fire Department's scheduled February 13 inspection (Tinort I Decl. ¶ 10). At this point, however, counsel for the parties began corresponding and arguing about deadlines, and cooperation between the parties deteriorated (AF 6, 8; Tinort I Decl. ¶¶ 10-11).

7. Appellant was pursuing having the corrective work accomplished, and, on January 20 and 24, 2011, received from Simplex Grinnell, a contractor, proposals for elevator work totaling \$5,437. Appellant signed the proposals on January 24. (Appellant's Appeal File Tab 1). However, the work identified in these proposals, while necessary, would not fully have corrected the Fire Department violations (Penland Decl. ¶¶ 12, 14 and attachment thereto; Declaration of M. Warren (Warren Decl.) ¶¶ 3-5, 10, 12 and attachments thereto). Specifically, the Simplex Grinnell proposals excluded necessary electrical work, work needed to connect the various systems, fireproofing, and patching and painting (Warren Decl. ¶¶ 4, 5, 7, 9; Penland Decl. ¶¶ 6, 8, 15; AF 27).

8. On January 25, 2011, Respondent informed Appellant by email that if a signed contract to correct the Fire Department violations were not submitted to Respondent by the end of the day, it would take over the work at Appellant's expense (AF 22; Lyne Decl. ¶ 13; Tinort I Decl. ¶ 13). Appellant responded by email the same day, informing Respondent that it was working with Simplex Grinnell to perform the work, and that it was awaiting approval from the Fire Department for a requested extension. Appellant informed Respondent that it wished to perform the work and was progressing to do so. The response did not provide a signed contract however (AF 22; Lyne Decl. ¶ 13; Tinort I Decl. ¶ 12).^[1]

9. On January 26, 2011, Appellant sent a letter to Respondent's contracting officer. The letter stated that the passenger elevator had been installed by Appellant in September 2010 in compliance with applicable codes but that the Fire Department required additions in December. Appellant's letter concluded:

The Fire Marshall, knowing the codes, and safety issues, required us to comply with his order by February 13, 2011. He has now extended this deadline until March 12, 2011 in

order to clarify the order.

We fully intend to comply with the Fire Marshall's order, understanding that the Fire Marshall's office is, among other things, a 'custodian' of public safety. All work will be done in compliance with the official dictates.

(September 22, 2011 Declaration of E. Tinort (Tinort II Decl.), attachment).

10. As Appellant's January 26 letter had informed Respondent, on that date, the Fire Department granted the 30-day extension that Appellant had requested, suspending its elevator inspection until March 12, 2011 (AF 10 (Fire Department report)). On January 27, 2011, the Fire Department also informed Respondent directly about the extension (AF 10; Lyne Decl. ¶ 14).

11. Nonetheless, on January 27, 2011, Respondent's contracting officer sent a letter to Appellant informing it that Respondent would correct the Fire Department violations at Appellant's expense and deduct the costs from its rent. The contracting officer explained that Respondent was doing so because Appellant had not begun the work. The contracting officer's letter referenced Appellant's January 26, 2011 letter, described in Finding 9, which had explained that Appellant would complete the work by the revised inspection date of March 12. The contracting officer warned Appellant not to take further action to correct the Fire Department violations (AF 12; Lyne Decl. ¶ 15; Tinort I Decl. ¶ 14).

12. On January 28, 2011, the Fire Department informed Respondent, in response to its request, that the passenger elevator at the P&DC could not be used until work on the sprinkler head in the pit was complete (AF 13). The record does not reveal whether the passenger elevator had been in operation between the date on which the Fire Department violations were identified and this communication (See AF 13).

13. Allen Kelly & Co., Inc. (Kelly) corrected the Fire Department violations for Respondent, completing the work on February 15, 2011. Kelly provided a nonspecific

[2]

\$11,198.85 invoice to Respondent dated February 24, 2011 (AF 16, 17). The work Kelly performed was necessary to correct the Fire Department violations (Penland Decl. ¶ 12;

Warren Decl. ¶¶ 10, 12). Kelly's \$11,198.85 invoice included \$5,437 for work performed under subcontract by Simplex Grinnell -- for the same work, at the same price that Appellant intended

to expend with Simplex Grinnell. Appellant does not contest this \$5,437 element of the costs sought by Respondent (Appellant's Supplemental Brief, at 1, 3).

14. The Fire Department violation work Kelly performed included the following additional costs:

- (a) \$2,750 for installation of conduit fittings and wiring by Watson, an electrical subcontractor;
- (b) \$200 for a permit from the North Carolina Department of Labor;
- (c) \$582.85 for a permit from Mecklenburg County; and
- (d) \$2,229 for Kelly's costs of bonding, electrical and plumbing permits, expediting, overhead and profit.

(AF 16, 27; Declaration of J. House (House Decl.) ¶ 3; Penland Decl. ¶¶ 12-13; Warren Decl. ¶¶ 10-12). The costs in Kelly's invoice were reasonable (Penland Decl. ¶ 14; Warren Decl. ¶ 12).

15. Simplex Grinnell was not licensed to perform the needed electrical work, while Watson was a licensed electrical firm (House Decl. ¶¶ 1-2).

16. Permits from the North Carolina Department of Labor and Mecklenburg County were required to perform work on the elevator needed to correct the Fire Department violations (Penland Decl. ¶ 9). A general contractor retained by Appellant to perform the elevator replacement in 2010 had obtained a permit from Mecklenburg County to address installation and finalization of the passenger elevator at the P&DC. The Fire Department violations could have been addressed under that permit which remained active. (Declaration of K. Mumtaz (Mumtaz Decl.) ¶¶ 1-6).

17. On April 12, 2011, Respondent informed Appellant that the Fire Department violations had been corrected, at a cost of \$11,253.85 which would be deducted from future rent if not paid (AF 19; Legrand Decl. ¶ 6). Thereafter, on May 17, 2011, Respondent's contracting officer issued a final decision assessing Appellant \$11,253.85, consisting of \$11,198.85 as described in the Kelley invoice and \$55 in administrative cost (AF 18, 19; Legrand Decl. ¶ 7). The final decision explained that since the work to resolve the Fire

[3] Department violations had not been started by Appellant by January 7, 2011, it was deemed that the work would not be completed by the February 1 deadline established by Respondent. Respondent announced that the identified amount would be offset against Appellant's May rent. (AF 19).

18. Appellant filed a notice of appeal of the contracting officer's April 12, 2011 letter, which was docketed as PSBCA No. 6383. Appellant elected the Board's Expedited procedures (May 25, 2011 Order). Thereafter, Appellant timely filed a notice of appeal of the contracting officer's May 17, 2011 final decision, which was docketed as PSBCA No. 6390. The cases were consolidated (June 14, 2011 and June 29, 2011 Orders).

19. At the parties' request, the Board established a schedule for resolution on the written record in lieu of a hearing, and further ordered that only entitlement would be addressed (July 13, 2011 Order). Following submission of evidence, and an extension requested by Appellant, Appellant conceded entitlement (See Appellant's Brief at 1; August 26, 2011 Order; Appellant's Supplemental Brief at 1). The Board therefore expanded its consideration to include quantum, and issued a schedule for submission of supplemental evidence and briefs addressing quantum. (August 26, 2011 and August 30, 2011 Orders). Both parties submitted supplemental evidence and briefs, and the record closed on October 14, 2011. (October 14, 2011 Order).

DECISION

Appellant concedes liability for the repairs, as well as for \$5,437 of the \$11,253.85 demanded by Respondent (Findings 13, 19). In contesting the remaining \$5,816.85, Appellant argues that Respondent imposed an arbitrary and unreasonable deadline upon it to correct the Fire Department violations, unreasonably failed to adjust that deadline when the Fire Department extended its inspection date, and deprived it of the opportunity to perform. Appellant argues, therefore, that Respondent should not recover any costs in excess of the amount Appellant would have spent for the work, which it maintains is limited to the Simplex Grinnell cost that it concedes. Respondent argues that it provided sufficient time for Appellant to perform the work as

demonstrated by the relatively short duration for the Fire Department violations to be corrected once it took over the work. Respondent concludes that Appellant's failure to make sufficient progress justified it in taking over the work and charging Appellant for all costs it expended.

There is no dispute that Appellant was responsible to resolve the Fire Department violations. Respondent's initial establishment of February 1 as the deadline to complete the work, which was twelve days before a scheduled Fire Department inspection (see Findings 4-5), has not been shown to have been unreasonable or not commensurate with the nature of the work required, and therefore was within Respondent's lease rights (See Finding 2).

Appellant complains that Respondent essentially moved the deadline forward arbitrarily, from February 1 to January 25 (see Findings 6, 8). Respondent did so rather abruptly, likely because of the deteriorated state of communications between the parties. However, Respondent was attempting to ensure that the work would be completed by its February 1 deadline necessitating an earlier start of the work. However, when the Fire Department inspection was extended to March 12, and Appellant asked Respondent for additional time to perform while explaining that it was progressing to perform, Respondent's refusal to cooperate became unreasonable. Respondent was unduly rigid and failed to consider the fluidity of the circumstances. See *Everett Plywood Corp. v. United States*, 512 F.2d 1082, 1089-90 (Ct. Cl. 1975) (discretion must be exercised fairly and reasonably).

We find it particularly telling that Respondent took over the work at the exact time that the Fire Department granted an extension and Respondent was informed that Appellant was about to perform (Findings 9-12).^[4] We also attach substantial weight to the fact that the passenger elevator in question had been inoperable for fourteen months just prior to this dispute (Finding 3). There is no evidence that an additional delay of no more than another month to resolve the Fire Department violations would have imposed a substantial additional burden on Respondent. See *Tamarack Mills LLC d/b/a Evergreen Forests*, AGBCA Nos. 2003-115-1, 2003-116-1, 04-1 BCA ¶ 32,591 (scope of duty to cooperate must be resolved case-by-case, looking at the full context of the parties' actions). Further, while denying

Appellant additional time to comply with the Fire Department's deadline as extended, Respondent took advantage of that extension itself, completing the work on February 15, after the date of the Fire Department's originally scheduled inspection (Finding 13).

Of course, as Appellant concedes, it is not excused from its admitted contractual responsibility to pay for correction of the Fire Department violations. Failure to have allowed a sufficient period to perform limits Respondent's recovery to what it would have cost Appellant to perform, which Appellant must prove. See *J. Leonard Spodek*, PSBCA No. 4207, 00-1 BCA ¶ 30,593. Once Respondent has shown that the costs it expended were reasonable in amount, Appellant must demonstrate that it could have performed such work at a lower cost if it had been provided the opportunity to do so. See *Butler Gulch, LLC*, PSBCA No. 5353, 08-1 BCA ¶ 33,839.

Although Respondent has not explained how it retained Kelly as a contractor, how the scope of work was crafted, or how it negotiated or otherwise controlled the costs expended, we have found those costs to be reasonable based on testimony describing the bases for the invoiced costs, and testimony analyzing such costs as reasonable in both scope and amount (Findings 13-15). As in a prior expedited appeal between these parties, Appellant did not take advantage of its opportunity to present evidence of what it would have cost it to perform had it been allowed to do so. See *Sud Des Moines, LLC*, PSBCA No. 6263, 2009 WL 4864463 (September 24, 2009). Accordingly, Respondent's evidence is largely un rebutted.

We nonetheless examine each of the component parts of the costs asserted by

Respondent to determine permissible recovery. Appellant concedes the costs for Simplex

Grinnell, and argues that those costs alone would have resolved the Fire Department

[5]

violations. We have found to the contrary. While a necessary part of the work, more

needed to be done (See Findings 7, 13, 15). The electrical work, work needed to connect the

various systems, fireproofing, patching, painting and related work were necessary (Finding 7),

and we have no basis to find the costs to accomplish such work to be unreasonable.

Accordingly, we find that the \$2,750 cost for the electrical work of installing conduit fittings and

wiring by Watson is recoverable.

Similarly, we find the \$2,229 charged for bonding, electrical and plumbing permits, expediting, overhead and profit for Kelly to be recoverable. Again, while Respondent has not explained how those costs were determined, unrebutted testimony found them to be necessary and reasonable, and we do not question that view where Appellant failed to come forward with rebutting evidence that such costs were unreasonable or that it would have incurred lower costs had it been permitted to perform. [6]

However, we deny Respondent recovery for \$582.85 for the cost of securing a permit from Mecklenburg County. Had Appellant been allowed to perform, a preexisting permit held by its contractor for this work would have sufficed (Finding 16). Accordingly, an additional cost to secure a Mecklenburg County permit is a duplicative expense that Appellant would not have incurred and we deny Respondent recovery for it.

Appellant has not presented evidence that it possessed a permit from the North Carolina Department of Labor, that such a permit was unnecessary, or that the \$200 cost incurred by Respondent to secure such a permit was unreasonable. We therefore permit recovery of that amount.

Although low in amount, [7] we deny Respondent's \$55 administrative costs as not justified under these circumstances. Had Appellant performed the work, Respondent would not have incurred the administrative costs that it did, and there is no contractual breach based on which an award of administrative costs may be allowed. See *J. Leonard Spodek d/b/a Nationwide Postal Management*, PSBCA No. 3710, 96-2 BCA ¶ 28,457.

SUMMARY

Of the \$11,253.85 sought by Respondent, we allow it to recover \$10,616, summarized below:

\$5,437 for work performed by Simplex Grinnell – conceded and allowed;

\$2,750 for work performed by Watson – allowed;

\$200 for a permit from the North Carolina Department of Labor – allowed;

\$582.85 for a permit from Mecklenburg County – disallowed;

\$2,229 for Kelly's costs of bonding, electrical and plumbing permits, expediting,

overhead and profit – allowed;

\$55 administrative costs – disallowed.

Respondent may recover \$10,616. If Respondent already has collected in excess of

this amount by rental offset, it shall pay Appellant the difference, plus applicable Contract

Disputes Act interest.

The appeals are granted in part and denied in part.

Gary E. Shapiro
Administrative Judge
Board Member

[1]

The letter described in Finding 9, *infra*, referenced a telephone discussion between the contracting officer and Appellant's principal on this day (January 25). However, the record does not include testimony describing this telephone discussion.

[2]

The record does not reveal how Kelly was retained by Respondent, how the scope of work was developed, or whether or how the costs were negotiated. A contract between Kelly and Respondent is not in the record.

[3]

The contracting officer's reference to January 7, 2011 appears to be a typographical error, which should have referenced January 27, 2011.

[4]

Even had that extension not been granted, the Fire Department's potential imposition of two \$50 fines, for which Appellant would have been responsible, does not reasonably support Respondent's rigidity in the face of Appellant's progress towards performing.

[5]

We find the conceded \$5,437 for work performed by Simplex Grinnell to be recoverable.

[6]

Appellant argues in its supplemental brief that its superintendent or prior contractor would have performed oversight, been bonded, and performed patching/painting, presumably (though not expressly represented) at no additional cost to Appellant. Appellant, however, submitted no evidence in support of those assertions.

[7]

Appellant argues that Respondent's administrative costs were deliberately understated and that Respondent hid such costs within the amounts it paid Kelly. There is no support in the record for these allegations.

November 22, 2011

Appeal of

WINONA RESTORATION PARTNERS LLC
d/b/a THE VILLAGE AT WINONA

LEASE AGREEMENT

PSBCA No. 6399

APPEARANCE FOR APPELLANT:
Brent L. Wilcoxson

APPEARANCE FOR RESPONDENT:
Jacqui De Laet Skoglund, Esq.
General Law Service Center
United States Postal Service

OPINION OF THE BOARD ON RESPONDENT'S MOTION TO DISMISS

Appellant, Winona Restoration Partners LLC, leases a post office to Respondent, United States Postal Service. Respondent altered a parking lot on or near the leased premises. Appellant demanded that Respondent restore the parking lot to its former condition. The contracting officer rejected Appellant's demand, and Appellant appealed. Appellant elected application of the Board's Small Claims (Expedited) procedures, 39 C.F.R. §955.13.

Respondent has filed a motion to dismiss the appeal, contending that the sole relief Appellant seeks is beyond the Board's authority. The following findings of fact are made for purposes of deciding this motion.

FINDINGS OF FACT

1. Under a lease dated September 22, 1999, Appellant leased the Winona Lake, Indiana Main Post Office to Respondent for ten years, beginning December 1, 1999. The lease contained an option available to Respondent for an additional five years, which Respondent has exercised, continuing the lease through November 30, 2014. (Stipulation of Non-Contested Facts for PSBCA No. 6398, paragraphs ("Stip.") 1, 2; Appeal File, tabs ("AF") 1, 2).

2. The lease permitted Respondent to make alterations to the leased premises (AF 1, General Condition A.21).

3. During the lease, Respondent modified the parking lot on or near the premises. By letter to the contracting officer from Appellant's counsel dated August 23, 2010, Appellant complained that Respondent's modification of the parking lot was unauthorized and demanded that Respondent restore the lot to its previous condition. (AF 5).

4. By letter of August 30, 2010, the contracting officer refused to restore the parking lot.

He cited paragraph A.21 of the General Conditions as authority for Respondent to make the alterations at issue without notification to the lessor. (AF 6).

[1]

5. In a December 11, 2010 letter to the contracting officer, Appellant appealed the decision to modify the parking lot and Respondent's refusal to restore the premises, requesting application of the Board's Small Claims (Expedited) procedure (AF 14). The contracting officer belatedly sent the appeal to the Board on July 22, 2011, at which time it was docketed.

DECISION

The Board deemed Appellant's December 11, 2010 letter as its complaint, but also noted that we lack authority to grant injunctive relief directing Respondent to restore the parking lot. The Board advised that it could consider an appeal related to a monetary claim submitted to the contracting officer. (Order dated August 2, 2011). The record does not reflect that Appellant has submitted a monetary claim related to Respondent's alteration of the parking lot. Directing Respondent to restore the parking lot to its previous condition—the only relief Appellant seeks in this appeal—involves an equitable remedy in the nature of injunctive relief. The Board lacks authority to order such relief. See *JM Carranza Trucking Co.*, PSBCA No.

6354, 11-1 BCA ¶ 34,643; *Luvín Constr. Corp.*, PSBCA No. 6235, 09-2 BCA ¶ 34,222; *Lee Ann Wyskiver*, PSBCA No. 3621, 95-2 BCA ¶ 27,755. The Board's lack of authority to order Respondent to restore the parking lot was highlighted in the August 2, 2011 Order in which Appellant was advised that it could submit a monetary claim to the contracting officer, which, if denied and appealed, could be considered by the Board. The record does not reflect that Appellant submitted a monetary claim, and, accordingly, this appeal is subject to dismissal. See *Tab Distributors, Inc.*, PSBCA No. 4134, 99-1 BCA ¶ 30,110.

The appeal is dismissed. However, this dismissal is without prejudice to Appellant's submission of a claim within the meaning of the lease's Claims and Disputes clause (AF 1, General Condition A.13) and an appeal of any adverse contracting officer's final decision to the Board in which appeal Appellant seeks monetary or other relief within the authority of the Board to grant.

Norman D. Menegat
Administrative Judge
Board Member

[1]

This letter was not identified as a final decision under the Contract Disputes Act and did not advise Appellant of its appeal rights.

November 22, 2011

Appeal of

WINONA RESTORATION PARTNERS LLC
d/b/a THE VILLAGE AT WINONA

LEASE AGREEMENT

PSBCA No. 6398

APPEARANCE FOR APPELLANT:
Brent L. Wilcoxson

APPEARANCE FOR RESPONDENT:
Jacqui De Laet Skoglund, Esq.

OPINION OF THE BOARD

Appellant, Winona Restoration Partners LLC, leased a post office to Respondent, United States Postal Service. The drinking fountain in the facility failed, and after Appellant denied responsibility for its repair, Respondent replaced it. The contracting officer issued a final decision notifying Appellant that the cost of the replacement would be deducted from Appellant's rent, and Appellant appealed.

At the joint request of the parties, the appeal is being decided on the record without an oral hearing in accordance with 39 C.F.R. §955.12. Appellant elected application of the Board's Small Claims (Expedited) procedures, 39 C.F.R. §955.13. Both entitlement and quantum will be addressed.

FINDINGS OF FACT

1. The Winona Lake, Indiana Main Post Office was constructed in 1957, and Respondent has occupied it as tenant continuously since December 1, 1957 (Joint Stipulation of Non-Contested Facts, paragraphs ("Stip.") 3, 4).

2. Appellant became the owner of the property and Respondent's lessor on or about October 7, 1996 (Stip. 5).

3. On September 22, 1999, the parties entered into a lease for the premises for ten years, beginning December 1, 1999. The lease contained an option available to Respondent for an additional five years, which Respondent has exercised, continuing the lease through November 30, 2014. (Stip. 1, 2; Appeal File, tabs ("AF") 1, 2).

4. The lease requires Appellant to furnish, among other features, a water system, and refers to General Condition A.24 for definitions (AF 1 (p. 2), Lease Clause 5). General Condition A.24, Lessor Obligations, provides,

The Lessor's obligations regarding the services to be provided are further defined as

i. If water system is furnished – Lessor must furnish a water system in good working order with separate water meter.

(AF 1 (p. 12), General Condition A.24 i; Stip. 8).

5. The lease contains a "Maintenance Rider, Lessor Responsibility" clause which

provides, in relevant part,

The lessor shall . . . maintain the demised premises, including the building and any and all equipment, fixtures, and appurtenances, whether severable or non-severable, furnished by the Lessor under this Lease, in good repair and tenable condition.

(AF 1 (p. 18); Stip. 6, 7).

6. The Maintenance Rider requires Respondent to notify Appellant of the need for

maintenance or repair that is Appellant's responsibility under the lease. If Appellant fails to perform its required maintenance or repair, the lease grants Respondent "the right to perform the work by contract or otherwise and withhold the cost thereof (which may include

administrative cost and/or interest) from payments due or to become due under" the lease.

(AF 1 (p. 18)).

7. On or about June 10, 2010, the only water fountain in the post office failed. The

fountain no longer provided cooled water or an adequate flow of water, and it leaked.

Respondent's employees turned off the water supply to the fountain. (AF 3, 4, 9).

8. The water fountain was refrigerated, plumbed into the building's water system (water line and drain line), and connected to the building's electrical system (Declaration of J. Deturk

("Deturk Decl.") ¶5; Declaration of B. Wilcoxson). It was installed prior to the parties' execution of the lease (Stip. 13), and had been in place and operational since at least 1966 (Deturk Decl. ¶¶5, 6).

9. By letter of August 3, 2010, Respondent notified Appellant of the need for repair of the water fountain. The letter stated Respondent's view that the lease required Appellant to repair the water fountain and set a deadline of August 31, 2010, for completion of the repairs. The letter further advised that if Appellant failed to make the repairs, the lease authorized Respondent to do so and recover the costs of the repairs plus administrative costs and interest from rent. (AF 4).

10. Appellant responded, through counsel, denying responsibility for repair of the water fountain (AF 5).

11. In an August 30, 2010 letter, Respondent repeated its interpretation of the lease as requiring Appellant to repair the water fountain (AF 6) and on September 14, 2010, notified Appellant that Respondent intended to perform the work necessary to repair the water fountain and that the costs of the work plus administrative costs and interest would be recovered from Appellant's rent. (AF 6, 7).

12. Respondent engaged a plumbing contractor who inspected the water fountain, noted that the compressor no longer worked, and recommended that the water fountain be replaced. The contractor installed a new replacement refrigerated water fountain and connected it to the existing plumbing and electrical systems. (AF 8, 9).

13. The plumbing contractor's bill reflected a price for materials of \$1,034.25 (new water fountain (\$1,015.80) and piping and fittings); \$393.75 for 5.25 labor hours; and \$65 for a trip charge (Standard Commercial Service Charge). Respondent paid the total bill of \$1,493. (AF 8, 9, 10; Stip. 11).

14. On November 5, 2010, the contracting officer demanded that Appellant pay \$1,508.98 for replacement of the water fountain. To the plumbing contractor's price of \$1,493, the contracting officer added administrative costs of \$15.98 reflecting one-half hour spent by the postal employee arranging for the work to be done by the plumbing contractor (AF 11, 12;

Stip. 14).

15. By final decision of December 6, 2010, the contracting officer stated Respondent's intention to withhold \$1,512.91 from Appellant's rent. That amount included an interest charge of \$3.93. (AF 13; Stip. 15, 16).

16. On December 11, 2010, Appellant appealed the final decision to the contracting officer, requesting that the Board's Small Claims (Expedited) procedure apply (AF 14). The contracting officer sent the appeal to the Board on July 22, 2011, at which time it was docketed.

DECISION

Appellant argues that it should be granted judgment in its favor because Respondent failed to send Appellant's Notice of Appeal to the Board promptly. As a result, Appellant's request for an expedited resolution of the appeal was thwarted. The Rules of Practice applicable to Board proceedings provide,

Upon receipt of a notice of appeal in any form, the contracting officer shall indicate thereon the date of mailing (or date of receipt, if otherwise conveyed) and within 10 days shall forward said notice of appeal to the Board, and shall include a copy of the contracting officer's final decision if one has been issued.

39 C.F.R. §955.4. In this case, the contracting officer, through counsel, sent Appellant's appeal to the Board about seven months after he received it. Respondent has not offered any explanation for the contracting officer's lack of diligence.

We do not condone Respondent's failure to comply with applicable regulations and by doing so denying Appellant's opportunity authorized under the Contract Disputes Act to obtain a speedy decision on its appeal. However, under the circumstances of this appeal, we discern no prejudice to presentation of Appellant's case once the matter was brought before the Board. Accordingly, we do not find that Respondent's conduct, though improper and unexplained, warrants granting the appeal.

Respondent argues that the water fountain was part of the demised premises, was furnished by the lessor, and, therefore, was within Appellant's duty under the lease to maintain the premises in good repair and tenantable condition. Appellant argues that since General

Condition A.24 only specifies that the lessor must furnish a water system in good working order with a separate water meter and does not mention any equipment or fixtures, the lessor was not obligated under the lease to provide a water fountain. Appellant continues that as it was not required to "furnish" the water fountain under the lease, it had no duty to repair or replace it once it failed.

Appellant's interpretation is unreasonable and is rejected. "Further defining" in clause A.24 of the lease the lessor's obligation to provide a water system by requiring that the water system be in good working order and have a separate meter (Finding 4) does not describe or limit the features that such a water system must have. The lease's identification of items within the scope of Appellant's repair responsibility under the Maintenance Rider as "equipment, fixtures, and appurtenances" is broad enough to include the water fountain at issue.

Appellant argues that the water fountain was not furnished by the lessor under the lease. If it were, however, Appellant is responsible for its repair. See *Brush Creek Partners*, PSBCA No. 5372, 08-2 BCA ¶ 33,957. In that case, evidence before the Board included plans related to the original construction of the building that indicated the lessor/builder was to install the water fountain. Here, Respondent has not presented drawings relating to the original construction of the Winona Lake Post Office in 1957. However, Respondent demonstrated that the water fountain had long been in the office, was the only drinking fountain in the office, and was connected to the plumbing and electrical systems. Moreover, it was in place when Appellant and Respondent entered into the September 22, 1999 lease for the premises. (Findings 7, 8).

These circumstances are sufficient to establish prima facie that the water fountain was provided by a lessor. Appellant has not disproved this fact. Appellant offered the statement of one of its employees familiar with construction in the area who states that the company that he believes built the Winona Lake Post Office was notoriously penurious and never would have willingly provided a drinking fountain. This assumes that the builder of the post office was free to dictate the features to be included in the building as opposed to complying with specifications established by the Post Office Department. We give this speculation no weight.

Appellant points out that the water fountain was not working for a period of time before it was replaced and Respondent's employees suffered no apparent ill effects from the lack of the water fountain, and that water was available from faucets elsewhere in the post office. While true, these facts have no bearing on Appellant's responsibility under the Maintenance Rider to maintain and repair/replace as necessary the lessor-furnished water fountain that was present and functioning at the time the lease was executed. While alternative water supplies were available, Respondent is entitled under the lease to a drinking water supply that is the functional equivalent of that present in the post office at the time the lease commenced. Therefore, we conclude that it was Appellant's responsibility under the Maintenance Rider to furnish Respondent a functioning water fountain. When it failed to do so, Respondent was entitled to repair or, if needed, replace the water fountain and to charge against rent the reasonable costs incurred. See *Nationwide Postal Management*, PSBCA No. 3938, 99-1 BCA ¶ 30,126.

Respondent demonstrated it incurred costs of \$1,493 for replacement of the fountain. Appellant does not challenge the reasonableness of that charge for removal of the old and installation of a new, replacement, refrigerated water fountain except to note that the work was done by an out-of-town contractor. However, the contractor's bill does not include a mileage or travel charge, and Appellant has not questioned the bill itself. We conclude that the costs were reasonable. See *Abcon Associates, Inc.*, PSBCA No. 5291, 09-1 BCA ¶ 34,100; *Jerald Michael*, PSBCA No. 4779, 04-1 BCA ¶ 32,497 at 160,766.

Appellant contends, however, that drinking water could have been provided at a lower cost by installing a chilled water dispenser utilizing refillable bottles that Respondent's employees could refill in the post office sinks. This is not equivalent to the water fountain installed and would require significantly more effort and cost to Respondent to provide drinking water. The lower cost of providing such a water dispenser is not relevant to the reasonableness of the costs Respondent incurred to install the replacement water fountain. Additionally, the cost of one-half hour of Respondent's official's time in arranging for replacement of the water fountain was reasonable and Respondent is not responsible for

recoverable under the terms of the lease. Respondent has not demonstrated the basis for its interest calculation, and that part of its claim is not recoverable. Accordingly, Respondent is entitled to recover \$1,508.98 from Appellant.

Except that Respondent may not recover interest on its claim, the appeal is denied.

Norman D. Menegat
Administrative Judge
Board Member

December 14, 2011

Appeal of

SAZIE WILSON

d/b/a

GIL TRUCKING

Under Contract No. HCR 10531

PSBCA No. 5247

APPEARANCE FOR APPELLANT:

James D. Hartt, Esq.

APPEARANCE FOR RESPONDENT:

Eugenia Izmaylova, Esq.

Office of the General Counsel

United States Postal Service

[1]

OPINION OF THE BOARD

Appellant, Sazie Wilson, doing business as Gil Trucking, has filed an appeal from a contracting officer's decision terminating for default his mail transportation contract with Respondent, United States Postal Service. At the election of the parties, the appeal is being decided on the record, 39 C.F.R. §955.12, without an oral hearing.

FINDINGS OF FACT

1. Contract HCR 10531 was renewed in July 2001 for the period beginning July 1,

2001, and ending June 30, 2005. The contract rate at the time of award was \$176,888.60 per annum. The contract required Appellant to transport mail, in both directions, between the

Westchester, New York Processing and Distribution Center (P&DC) and various destinations within 18 miles of the P&DC. Appellant was generally required to operate between seven and

nine round trips on Mondays through Saturdays, and two trips on Sundays. A manager at the P&DC was identified in the contract as the Administrative Official (AO), charged by the

contracting officer with administering and supervising the contract. (Appeal File Tab (AF) 1, pp. 1, 6-8, 33).

2. The contract required Appellant to "carry all mail tendered for transportation under this contract ... with certainty, celerity, and security, in accordance with the operating

schedule." In addition, Appellant was required to "have readily available sufficient stand-by equipment ... to prevent delays in emergencies such as mechanical failures" (AF 1, clauses

B.2.a and B.3.a (pp. 11, 13)).

3. The contract's "Termination for Default" clause (clause B-13; January 1997

(modified)) provided, in part, that,

a. (1) The Postal Service may, ... by written notice of default to the supplier, terminate this contract in whole or in part if the supplier fails to:

- (a) Complete the requirements of this contract within the time specified in the contract or any extension;
- (b) Make progress, so as to endanger performance of this contract ...; or
- (c) Perform any of the other provisions of this contract (but see subparagraph a.(2) following).

(2) The Postal Service's right to terminate this contract under a.(1)(b) and (c) above may be exercised if the supplier does not cure the failure within three days ... after receipt of the notice from the contracting officer specifying the failure ...

* * *

g. If, after termination, it is determined that the supplier was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for convenience.

(AF 1, clause H.4 (p. 34.5)).

4. By letter dated December 5, 2002, citing four instances of late service and six instances of omitted service in the previous three weeks, the Transportation Networks manager at the P&DC advised Appellant that she considered contract service to be unsatisfactory. The manager warned Appellant that if service did not improve, she would recommend either substantial fines or that the contract be terminated. (AF 7).

5. In an April 5, 2004 letter, citing 11 instances of omitted service and nine instances of late service since the previous October, the manager again complained to Appellant about unsatisfactory service. She warned Appellant that if satisfactory service was not immediately reestablished, she would recommend that the contract be terminated. (AF 9, 10).

6. Between August 10 and October 29, 2004, Appellant ran at least 22 trips late and failed to run at least seven trips (AF 20, pp. 143-172).

7. By letter dated November 2, 2004, the manager, citing a list of irregularities she stated had occurred since the April 5, 2004 letter was issued, stated that she considered Appellant's performance unsatisfactory, due to "frequent breakdowns, drivers not maintaining schedule and omitted service." The manager indicated that she was considering recommending termination, but stated that before she did so she requested that Appellant [4] attend a formal conference on November 15, 2004. (AF 12).

8. Between November 5 and December 6, 2004, Appellant ran at least five trips late and failed to run at least two trips (AF 20, pp. 174-181).

9. By letter dated November 30, 2004, the manager again requested that Appellant attend a formal conference, this time on December 8, 2004. She warned that Appellant's "failure to comply with this meeting will result in immediate suspension of your Highway Contract Route." The parties met on December 8, 2004, at which meeting the manager informed Appellant that she expected service to be "totally satisfactory" for the remaining term of the contract. (AF 13, 15).

10. On December 9, 2004, Appellant operated one trip 35 minutes late. On December 11, Appellant failed to operate at least three of his trips, and on December 13, he failed to operate one trip. (AF 20, pp. 182-186).

11. In an email message dated Monday, December 13, 2004, the contracting officer indicated that he had been contacted by a senior plant manager at the Westchester P&DC

complaining of Appellant's missed trips and of the "extraordinary lengths" the manager had to go through to cover the service. After evaluating the irregularity reports and the efforts by the AO, through letters and meetings, to improve Appellant's service, the contracting officer directed a subordinate to draft a default termination letter, with termination to occur by the middle of the week. (AF 16; Declaration of H. Martinez, dated November 13, 2009).

12. In a final decision dated December 16, 2004, the contracting officer terminated Appellant's contract for default, effective as of the close of business on December 17, 2004, "for failure to perform service according to the terms of the contract." Simultaneously with the termination, the contracting officer issued a Contract Route Service Order suspending Appellant's pay until further notice. (AF 18, 19). Appellant filed a timely appeal of the termination.

DECISION

Respondent, which has the burden of proof in this termination for default appeal, see *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *Charli Selsa Schiver d/b/a NGX-Schiver*, PSBCA No. 4545, 02-2 BCA ¶ 31,937; *Douglas Cremer*, PSBCA No. 3108, 93-2 BCA ¶ 25,565, argues primarily that termination was justified by Appellant's delivery delays and failures, and argues that the contracting officer's decision to terminate was within his discretion.

Appellant challenges the default termination on a number of grounds. First, Appellant takes the position that the termination was improper, and should be converted to a termination for convenience, because the contracting officer failed to give Appellant a three-day notice and opportunity to cure before terminating for default. Appellant argues that a three-day notice was mandated by paragraph a.(2) of the Termination for Default Clause (Finding 3), and was a prerequisite to the exercise of the contracting officer's right to terminate. Moreover, Appellant argues, in failing to give him the opportunity to cure before terminating the contract, the contracting officer acted arbitrarily and capriciously.

Second, Appellant argues that his ability to perform the contract adequately was adversely affected because he was denied raises "consistent with other suppliers and [his] financial situation." Appellant cites as support for this argument that many of the irregularity reports from his route reflected mechanical breakdowns as the reason for service delays and omissions, and asserts that the "routine" mechanical breakdowns were caused by a shortage of funds available for maintenance of his trucks.

Finally, as relief for the allegedly improper termination, Appellant demands payment in the amount of \$105,379.41, which he alleges is the unpaid contract amount through the end of the contract term (June 2005), plus an unspecified amount representing the "full value of raises appellant was entitled to but did not receive." In addition, Appellant seeks the relief set out in paragraph g of the Termination for Default clause – which provides for the conversion of an invalid termination for default to a termination for convenience (Finding 3).

Respondent replies that the contract did not require it to give the three-day cure notice that Appellant has argued was mandated. In the alternative, Respondent contends that the conferences held by, and letters sent by, the Administrative Official (Findings 4, 5, 7, 9) provided any necessary notice.

With regard to Appellant's argument alleging arbitrary, capricious, and bad faith actions by the contracting officer, Respondent argues that there was a rational, operations-based reason for the contracting officer's exercise of his discretion to terminate. Respondent also argues that there is no evidence of any specific intent to harm Appellant, which, Respondent contends, is a prerequisite to a finding of bad faith.

Addressing Appellant's contention with respect to the three-day cure notice first, we agree with Respondent that such a notice was not required under the language of the contract. As we have previously held, failures to perform required trips – or delays in their performance – were failures to complete the contract requirements within the time specified and, therefore, fell within paragraph a.(1)(a) of the Termination for Default clause (Finding 3). *Kemcorp*, PSBCA No. 4454, 00-2 BCA ¶ 31,146 at 153,829. Thus, the cure notice specified under paragraph a.
[5]
(2) was not a prerequisite to a termination on that basis. and we do not accept Appellant's

[6]

contention to the contrary.

As noted above, Respondent has the burden of proving the propriety of the default

termination. In this instance, we consider Appellant's failure to operate at least three trips on December 11 and one trip on December 13, when combined with Appellant's earlier

performance failures and the warnings from the AO, to constitute a substantial failure of

performance and to justify the termination, unless Appellant can demonstrate either that these performance failures were excusable or that the contracting officer's decision to terminate the contract constituted an abuse of discretion. See, e.g., *Lissa Aichele*, PSBCA No. 5354, 09-2 BCA ¶ 34,259; *Janet L. Fox and Todd Fox*, PSBCA Nos. 6159, 6169, 09-1 BCA ¶ 34,082 at 168,507, and cases cited therein.

Appellant does not deny that these failures occurred, and his only argument for

excusability appears to be his contention that he was unable to maintain his trucks properly because he was denied certain, undefined "raises" consistent with other suppliers. While

Appellant made this argument in his brief, there is no record evidence directly supporting his

contention. We note that there is no indication in the reports for the deficiencies that directly led to his termination that the missed trips were caused by mechanical breakdowns (Finding 10).

Rather there are simply notations that Appellant failed to report to run those trips. In addition,

Appellant has failed to offer evidence showing that Respondent's failure to pay appropriate

"raises", if it occurred at all, was the primary or controlling cause of Appellant's failure to perform satisfactorily. See, e.g., *E&J Trucking*, PSBCA Nos. 5092, 5188, 09-1 BCA ¶ 34,073 at

168,475; *Todd's Letter Carriers*, PSBCA Nos. 4904-4920, 5002, 5003, 05-2 BCA ¶ 33,121 at 164,136, and cases cited therein. Accordingly, Appellant has not shown the failures that led to

this termination to be excusable.

We turn next to Appellant's contention that the contracting officer abused his discretion

when terminating the contract for default. In order to find an abuse of discretion, a decision

must be found to be arbitrary and capricious. *United States Fidelity & Guarantee Co. v. United*

States, 676 F.2d 622, 630 (Ct. Cl. 1982). The Court of Claims also set out four separate factors which should be used in determining if conduct by a government official is arbitrary and

capricious. These are: (1) evidence of subjective bad faith on the part of the official; (2) if there is "no reasonable basis" for the decision; (3) the amount of discretion given to the official, *i.e.*, the greater the discretion granted, the more difficult it will be to prove the decision was arbitrary and capricious; and, (4) whether there has been a proven violation of an applicable statute or regulation. *United States Fidelity & Guarantee*, 675 F.2d at 630, citing *Keco Industries, Inc. v. United States*, 492 F.2d 1200 (Ct. Cl. 1974).

To prove bad faith, Appellant must demonstrate, by the equivalent of clear and convincing evidence, a specific intent to harm Appellant. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002); *see, e.g., Gary W. Noble*, PSBCA No. 4094, 00-1 BCA ¶ 30,602 (on reconsideration). Appellant's argument is somewhat unclear, but he appears to be contending that the contracting officer had prejudged the situation and had already decided to terminate the contract at the time he gave his subordinate the direction to prepare a termination letter (Finding 11), without first allowing Appellant the opportunity to "cure" the default.

From the record, it appears that the contracting officer had, in fact, decided to terminate the contract at the time he directed the preparation of the termination letter. However, by that time he had reviewed and evaluated the irregularity reports and considered the AO's efforts to improve Appellant's service, and there is no indication in the record that his decision was other than one based on that evaluation. We do not see in this record a demonstration that the contracting officer's motivation was to harm Appellant. Moreover, as noted above, there was no contractual requirement to provide Appellant a notice and the opportunity to cure the deficiencies. Accordingly, Appellant has not demonstrated subjective bad faith by the contracting officer.

Appellant does not address the second element – *i.e.*, whether the contracting officer's action had a reasonable basis. As indicated above, however, there is no record evidence suggesting that the basis for the contracting officer's termination action was other than the improvement of service – clearly a reasonable basis for the action. Accordingly, this element militates in favor of Respondent.

October 28, 2011

Appeals of

SUD FAMILY LIMITED PARTNERSHIP

LEASE AGREEMENT

PSBCA Nos. 6383 and 6390

APPEARANCE FOR APPELLANT

Suniti R. Sud, Esq.

APPEARANCE FOR RESPONDENT

Alfred J. Zwettler, Esq.

OPINION OF THE BOARD

Appellant, Sud Family Limited Partnership, appeals a decision by Respondent, United States Postal Service, to recover by rental offset costs expended to resolve fire code violations at a postal facility Appellant leases to Respondent. Appellant elected the Board's Small Claims (Expedited) Procedure, and has conceded entitlement. The parties have submitted this appeal on the record, pursuant to 39 CFR § 955.12. We rule in favor of Respondent, but not for the complete recovery it seeks.

FINDINGS OF FACT

1. In 1975, Appellant's predecessor in interest and Respondent entered into a lease for the Charlotte, North Carolina Processing and Distribution Center (P&DC) (Appeal File Tab (AF) 1). The lease was renewed and expires in 2015 (AF 2). Appellant succeeded to the lease in 2006 (Declaration of P. Lyne (Lyne Decl.) ¶ 2; August 2, 2011 Declaration of E. Tinort (Tinort I Decl.) ¶ 5).

2. The P&DC lease (AF 1) includes the following provisions:

The Lessor shall . . . maintain the demised premises, including the building and any and all equipment, fixtures and appurtenances, whether severable or non-severable, furnished by the Lessor under this lease, in good repair and tenantable condition. . . .

Lease, ¶ 11 (a).

When the need arises for maintenance or repair or for restoration to a condition suitable for the purpose for which leased, the Postal Service shall (except in emergencies) give

the Lessor written notice thereof, specifying a time for completion of the work which is reasonable and commensurate with the nature of the work required. If the Lessor . . . fails to prosecute the work with such diligence as will ensure its completion within the time specified in the written notice . . . or fails to complete the work within said time, the Postal Service shall have the right to perform the work, by contract or otherwise, and withhold the cost thereof from payments due or to become due under this lease . . .

Lease, ¶ 11 (c).

The Lessor shall, without additional expense to the Postal Service, be responsible for obtaining any necessary licenses and permits for privately owned buildings, and for complying with any applicable Federal, State, and municipal laws, codes and regulations . . .

Lease, ¶ 15 (a).

3. The P&DC is a two-story facility that includes a passenger elevator and a cargo elevator. Appellant replaced the passenger elevator, which remained out of service from July 2009 until September 2010. (Lyne Decl. ¶ 3; Tinort I Decl. ¶¶ 4, 6; Declaration of M. Legrand (Legrand Decl.) ¶ 5).

4. The Charlotte Fire Department (Fire Department) inspected the newly replaced passenger elevator, and on December 15, 2010, issued an inspection report. The report identified two fire code violations involving sprinkler head spacing and a fire alarm system (the Fire Department violations). Specifically, the inspection report concluded that sprinklers must be added in the machine room and elevator pit, and that smoke and heat detectors must be added in the elevator shaft. The inspection report identified separate \$50 fines if the violations remained when the Fire Department conducted its next inspection, scheduled for February 13, 2011 (AF 3, 5; Lyne Decl. ¶ 4; Tinort I Decl. ¶ 7; Declaration of K. Penland (Penland Decl.) ¶ 5; Legrand Decl. ¶ 5).

5. On December 22, 2010, Respondent sent a letter to Appellant requiring it to resolve the Fire Department violations by February 1, 2011. The letter informed Appellant that failure to do so would result in Respondent performing the work and deducting the cost from Appellant's rent. (AF 4; Lyne Decl. ¶ 6). On January 5, 2011, Appellant assured Respondent that the Fire Department violations would be corrected by February 1 (AF 5; Lyne Decl. ¶ 9).

6. On January 14, 2011, Respondent's contracting officer notified Appellant that if

the work to resolve the Fire Department violations were not begun by January 24, Respondent would take over the project (AF 7; Tinort I Decl. ¶ 10). Respondent believed that the January 24 deadline was necessary in order to have the work completed by the Fire Department's scheduled February 13 inspection (Tinort I Decl. ¶ 10). At this point, however, counsel for the parties began corresponding and arguing about deadlines, and cooperation between the parties deteriorated (AF 6, 8; Tinort I Decl. ¶¶ 10-11).

7. Appellant was pursuing having the corrective work accomplished, and, on January 20 and 24, 2011, received from Simplex Grinnell, a contractor, proposals for elevator work totaling \$5,437. Appellant signed the proposals on January 24. (Appellant's Appeal File Tab 1). However, the work identified in these proposals, while necessary, would not fully have corrected the Fire Department violations (Penland Decl. ¶¶ 12, 14 and attachment thereto; Declaration of M. Warren (Warren Decl.) ¶¶ 3-5, 10, 12 and attachments thereto). Specifically, the Simplex Grinnell proposals excluded necessary electrical work, work needed to connect the various systems, fireproofing, and patching and painting (Warren Decl. ¶¶ 4, 5, 7, 9; Penland Decl. ¶¶ 6, 8, 15; AF 27).

8. On January 25, 2011, Respondent informed Appellant by email that if a signed contract to correct the Fire Department violations were not submitted to Respondent by the end of the day, it would take over the work at Appellant's expense (AF 22; Lyne Decl. ¶ 13; Tinort I Decl. ¶ 13). Appellant responded by email the same day, informing Respondent that it was working with Simplex Grinnell to perform the work, and that it was awaiting approval from the Fire Department for a requested extension. Appellant informed Respondent that it wished to perform the work and was progressing to do so. The response did not provide a signed contract however (AF 22; Lyne Decl. ¶ 13; Tinort I Decl. ¶ 12).

9. On January 26, 2011, Appellant sent a letter to Respondent's contracting officer. The letter stated that the passenger elevator had been installed by Appellant in September 2010 in compliance with applicable codes but that the Fire Department required additions in December. Appellant's letter concluded:

The Fire Marshall, knowing the codes, and safety issues, required us to comply with his order by February 13, 2011. He has now extended this deadline until March 12, 2011 in

order to clarify the order.

We fully intend to comply with the Fire Marshall's order, understanding that the Fire Marshall's office is, among other things, a 'custodian' of public safety. All work will be done in compliance with the official dictates.

(September 22, 2011 Declaration of E. Tinort (Tinort II Decl.), attachment).

10. As Appellant's January 26 letter had informed Respondent, on that date, the Fire Department granted the 30-day extension that Appellant had requested, suspending its elevator inspection until March 12, 2011 (AF 10 (Fire Department report)). On January 27, 2011, the Fire Department also informed Respondent directly about the extension (AF 10; Lyne Decl. ¶ 14).

11. Nonetheless, on January 27, 2011, Respondent's contracting officer sent a letter to Appellant informing it that Respondent would correct the Fire Department violations at Appellant's expense and deduct the costs from its rent. The contracting officer explained that Respondent was doing so because Appellant had not begun the work. The contracting officer's letter referenced Appellant's January 26, 2011 letter, described in Finding 9, which had explained that Appellant would complete the work by the revised inspection date of March 12. The contracting officer warned Appellant not to take further action to correct the Fire Department violations (AF 12; Lyne Decl. ¶ 15; Tinort I Decl. ¶ 14).

12. On January 28, 2011, the Fire Department informed Respondent, in response to its request, that the passenger elevator at the P&DC could not be used until work on the sprinkler head in the pit was complete (AF 13). The record does not reveal whether the passenger elevator had been in operation between the date on which the Fire Department violations were identified and this communication (See AF 13).

13. Allen Kelly & Co., Inc. (Kelly) corrected the Fire Department violations for Respondent, completing the work on February 15, 2011. Kelly provided a nonspecific [2]

\$11,198.85 invoice to Respondent dated February 24, 2011 (AF 16, 17). The work Kelly performed was necessary to correct the Fire Department violations (Penland Decl. ¶ 12;

Warren Decl. ¶¶ 10, 12). Kelly's \$11,198.85 invoice included \$5,437 for work performed under subcontract by Simplex Grinnell – for the same work, at the same price that Appellant intended

to expend with Simplex Grinnell. Appellant does not contest this \$5,437 element of the costs sought by Respondent (Appellant's Supplemental Brief, at 1, 3).

14. The Fire Department violation work Kelly performed included the following additional costs:

- (a) \$2,750 for installation of conduit fittings and wiring by Watson, an electrical subcontractor;
- (b) \$200 for a permit from the North Carolina Department of Labor;
- (c) \$582.85 for a permit from Mecklenburg County; and
- (d) \$2,229 for Kelly's costs of bonding, electrical and plumbing permits, expediting, overhead and profit.

(AF 16, 27; Declaration of J. House (House Decl.) ¶ 3; Penland Decl. ¶¶ 12-13; Warren Decl. ¶¶ 10-12). The costs in Kelly's invoice were reasonable (Penland Decl. ¶ 14; Warren Decl. ¶ 12).

15. Simplex Grinnell was not licensed to perform the needed electrical work, while Watson was a licensed electrical firm (House Decl. ¶¶ 1-2).

16. Permits from the North Carolina Department of Labor and Mecklenburg County were required to perform work on the elevator needed to correct the Fire Department violations (Penland Decl. ¶ 9). A general contractor retained by Appellant to perform the elevator replacement in 2010 had obtained a permit from Mecklenburg County to address installation and finalization of the passenger elevator at the P&DC. The Fire Department violations could have been addressed under that permit which remained active. (Declaration of K. Mumtaz (Mumtaz Decl.) ¶¶ 1-6).

17. On April 12, 2011, Respondent informed Appellant that the Fire Department violations had been corrected, at a cost of \$11,253.85 which would be deducted from future rent if not paid (AF 19; Legrand Decl. ¶ 6). Thereafter, on May 17, 2011, Respondent's contracting officer issued a final decision assessing Appellant \$11,253.85, consisting of \$11,198.85 as described in the Kelley invoice and \$55 in administrative cost (AF 18, 19; Legrand Decl. ¶ 7). The final decision explained that since the work to resolve the Fire

Department violations had not been started by Appellant by January 7, 2011, it was deemed that the work would not be completed by the February 1 deadline established by Respondent. Respondent announced that the identified amount would be offset against Appellant's May rent. (AF 19).

18. Appellant filed a notice of appeal of the contracting officer's April 12, 2011 letter, which was docketed as PSBCA No. 6383. Appellant elected the Board's Expedited procedures (May 25, 2011 Order). Thereafter, Appellant timely filed a notice of appeal of the contracting officer's May 17, 2011 final decision, which was docketed as PSBCA No. 6390. The cases were consolidated (June 14, 2011 and June 29, 2011 Orders).

19. At the parties' request, the Board established a schedule for resolution on the written record in lieu of a hearing, and further ordered that only entitlement would be addressed (July 13, 2011 Order). Following submission of evidence, and an extension requested by Appellant, Appellant conceded entitlement (See Appellant's Brief at 1; August 26, 2011 Order; Appellant's Supplemental Brief at 1). The Board therefore expanded its consideration to include quantum, and issued a schedule for submission of supplemental evidence and briefs addressing quantum. (August 26, 2011 and August 30, 2011 Orders). Both parties submitted supplemental evidence and briefs, and the record closed on October 14, 2011. (October 14, 2011 Order).

DECISION

Appellant concedes liability for the repairs, as well as for \$5,437 of the \$11,253.85 demanded by Respondent (Findings 13, 19).

In contesting the remaining \$5,816.85, Appellant argues that Respondent imposed an arbitrary and unreasonable deadline upon it to correct the Fire Department violations, unreasonably failed to adjust that deadline when the Fire Department extended its inspection date, and deprived it of the opportunity to perform. Appellant argues, therefore, that Respondent should not recover any costs in excess of the amount Appellant would have spent for the work, which it maintains is limited to the Simplex Grinnell cost that it concedes. Respondent argues that it provided sufficient time for Appellant to perform the work as

demonstrated by the relatively short duration for the Fire Department violations to be corrected once it took over the work. Respondent concludes that Appellant's failure to make sufficient progress justified it in taking over the work and charging Appellant for all costs it expended.

There is no dispute that Appellant was responsible to resolve the Fire Department violations. Respondent's initial establishment of February 1 as the deadline to complete the work, which was twelve days before a scheduled Fire Department inspection (see Findings 4-5), has not been shown to have been unreasonable or not commensurate with the nature of the work required, and therefore was within Respondent's lease rights (See Finding 2).

Appellant complains that Respondent essentially moved the deadline forward arbitrarily, from February 1 to January 25 (see Findings 6, 8). Respondent did so rather abruptly, likely because of the deteriorated state of communications between the parties. However, Respondent was attempting to ensure that the work would be completed by its February 1 deadline necessitating an earlier start of the work. However, when the Fire Department inspection was extended to March 12, and Appellant asked Respondent for additional time to perform while explaining that it was progressing to perform, Respondent's refusal to cooperate became unreasonable. Respondent was unduly rigid and failed to consider the fluidity of the circumstances. See *Everett Plywood Corp. v. United States*, 512 F.2d 1082, 1089-90 (Ct. Cl. 1975) (discretion must be exercised fairly and reasonably).

We find it particularly telling that Respondent took over the work at the exact time that the Fire Department granted an extension and Respondent was informed that Appellant was

[4]
about to perform (Findings 9-12). We also attach substantial weight to the fact that the passenger elevator in question had been inoperable for fourteen months just prior to this dispute (Finding 3). There is no evidence that an additional delay of no more than another month to resolve the Fire Department violations would have imposed a substantial additional burden on Respondent. See *Tamarack Mills LLC d/b/a Evergreen Forests*, AGBCA Nos. 2003-115-1, 2003-116-1, 04-1 BCA ¶ 32,591 (scope of duty to cooperate must be resolved case-by-case, looking at the full context of the parties' actions). Further, while denying

Appellant additional time to comply with the Fire Department's deadline as extended, Respondent took advantage of that extension itself, completing the work on February 15, after the date of the Fire Department's originally scheduled inspection (Finding 13).

Of course, as Appellant concedes, it is not excused from its admitted contractual responsibility to pay for correction of the Fire Department violations. Failure to have allowed a sufficient period to perform limits Respondent's recovery to what it would have cost Appellant to perform, which Appellant must prove. See *J. Leonard Spodek*, PSBCA No. 4207, 00-1 BCA ¶ 30,593. Once Respondent has shown that the costs it expended were reasonable in amount, Appellant must demonstrate that it could have performed such work at a lower cost if it had been provided the opportunity to do so. See *Butler Gulch, LLC*, PSBCA No. 5353, 08-1 BCA ¶ 33,839.

Although Respondent has not explained how it retained Kelly as a contractor, how the scope of work was crafted, or how it negotiated or otherwise controlled the costs expended, we have found those costs to be reasonable based on testimony describing the bases for the invoiced costs, and testimony analyzing such costs as reasonable in both scope and amount (Findings 13-15). As in a prior expedited appeal between these parties, Appellant did not take advantage of its opportunity to present evidence of what it would have cost it to perform had it been allowed to do so. See *Sud Des Moines, LLC*, PSBCA No. 6263, 2009 WL 4864463 (September 24, 2009). Accordingly, Respondent's evidence is largely un rebutted.

We nonetheless examine each of the component parts of the costs asserted by

Respondent to determine permissible recovery. Appellant concedes the costs for Simplex

Grinnell, and argues that those costs alone would have resolved the Fire Department

[5]

violations. We have found to the contrary. While a necessary part of the work, more

needed to be done (See Findings 7, 13, 15). The electrical work, work needed to connect the

various systems, fireproofing, patching, painting and related work were necessary (Finding 7),

and we have no basis to find the costs to accomplish such work to be unreasonable.

Accordingly, we find that the \$2,750 cost for the electrical work of installing conduit fittings and wiring by Watson is recoverable.

Similarly, we find the \$2,229 charged for bonding, electrical and plumbing permits, expediting, overhead and profit for Kelly to be recoverable. Again, while Respondent has not explained how those costs were determined, unrebutted testimony found them to be necessary and reasonable, and we do not question that view where Appellant failed to come forward with rebutting evidence that such costs were unreasonable or that it would have incurred lower costs had it been permitted to perform. [6]

However, we deny Respondent recovery for \$582.85 for the cost of securing a permit from Mecklenburg County. Had Appellant been allowed to perform, a preexisting permit held by its contractor for this work would have sufficed (Finding 16). Accordingly, an additional cost to secure a Mecklenburg County permit is a duplicative expense that Appellant would not have incurred and we deny Respondent recovery for it.

Appellant has not presented evidence that it possessed a permit from the North Carolina Department of Labor, that such a permit was unnecessary, or that the \$200 cost incurred by Respondent to secure such a permit was unreasonable. We therefore permit recovery of that amount.

Although low in amount, [7] we deny Respondent's \$55 administrative costs as not justified under these circumstances. Had Appellant performed the work, Respondent would not have incurred the administrative costs that it did, and there is no contractual breach based on which an award of administrative costs may be allowed. See *J. Leonard Spodek d/b/a Nationwide Postal Management*, PSBCA No. 3710, 96-2 BCA ¶ 28,457.

SUMMARY

Of the \$11,253.85 sought by Respondent, we allow it to recover \$10,616, summarized below:

\$5,437 for work performed by Simplex Grinnell – conceded and allowed;

\$2,750 for work performed by Watson – allowed;

\$200 for a permit from the North Carolina Department of Labor – allowed;

\$582.85 for a permit from Mecklenburg County – disallowed;

\$2,229 for Kelly's costs of bonding, electrical and plumbing permits, expediting,

overhead and profit – allowed;

\$55 administrative costs – disallowed.

Respondent may recover \$10,616. If Respondent already has collected in excess of this amount by rental offset, it shall pay Appellant the difference, plus applicable Contract

Disputes Act interest.

The appeals are granted in part and denied in part.

Gary E. Shapiro
Administrative Judge
Board Member

[1] The letter described in Finding 9, *infra*, referenced a telephone discussion between the contracting officer and Appellant's principal on this day (January 25). However, the record does not include testimony describing this telephone discussion.

[2] The record does not reveal how Kelly was retained by Respondent, how the scope of work was developed, or whether or how the costs were negotiated. A contract between Kelly and Respondent is not in the record.

[3] The contracting officer's reference to January 7, 2011 appears to be a typographical error, which should have referenced January 27, 2011.

[4] Even had that extension not been granted, the Fire Department's potential imposition of two \$50 fines, for which Appellant would have been responsible, does not reasonably support Respondent's rigidity in the face of Appellant's progress towards performing.

[5] We find the conceded \$5,437 for work performed by Simplex Grinnell to be recoverable.

[6] Appellant argues in its supplemental brief that its superintendent or prior contractor would have performed oversight, been bonded, and performed patching/painting, presumably (though not expressly represented) at no additional cost to Appellant. Appellant, however, submitted no evidence in support of those assertions.

[7] Appellant argues that Respondent's administrative costs were deliberately understated and that Respondent hid such costs within the amounts it paid Kelly. There is no support in the record for these allegations.

November 22, 2011

Appeal of

WINONA RESTORATION PARTNERS LLC
d/b/a THE VILLAGE AT WINONA

LEASE AGREEMENT

PSBCA No. 6399

APPEARANCE FOR APPELLANT:
Brent L. Wilcoxson

APPEARANCE FOR RESPONDENT:
Jacqui De Laet Skoglund, Esq.
General Law Service Center
United States Postal Service

OPINION OF THE BOARD ON RESPONDENT'S MOTION TO DISMISS

Appellant, Winona Restoration Partners LLC, leases a post office to Respondent, United States Postal Service. Respondent altered a parking lot on or near the leased premises. Appellant demanded that Respondent restore the parking lot to its former condition. The contracting officer rejected Appellant's demand, and Appellant appealed. Appellant elected application of the Board's Small Claims (Expedited) procedures, 39 C.F.R. §955.13.

Respondent has filed a motion to dismiss the appeal, contending that the sole relief Appellant seeks is beyond the Board's authority. The following findings of fact are made for purposes of deciding this motion.

FINDINGS OF FACT

1. Under a lease dated September 22, 1999, Appellant leased the Winona Lake, Indiana Main Post Office to Respondent for ten years, beginning December 1, 1999. The lease contained an option available to Respondent for an additional five years, which Respondent has exercised, continuing the lease through November 30, 2014. (Stipulation of Non-Contested Facts for PSBCA No. 6398, paragraphs ("Stip.") 1, 2; Appeal File, tabs ("AF") 1, 2).
2. The lease permitted Respondent to make alterations to the leased premises (AF 1, General Condition A.21).
3. During the lease, Respondent modified the parking lot on or near the premises. By letter to the contracting officer from Appellant's counsel dated August 23, 2010, Appellant complained that Respondent's modification of the parking lot was unauthorized and demanded that Respondent restore the lot to its previous condition. (AF 5).
4. By letter of August 30, 2010, the contracting officer refused to restore the parking lot. He cited paragraph A.21 of the General Conditions as authority for Respondent to make the alterations at issue without notification to the lessor. (AF 6).
5. In a December 11, 2010 letter to the contracting officer, Appellant appealed the decision to modify the parking lot and Respondent's refusal to restore the premises, requesting application of the Board's Small Claims (Expedited) procedure (AF 14). The contracting officer belatedly sent the appeal to the Board on July 22, 2011, at which time it was docketed.

DECISION

The Board deemed Appellant's December 11, 2010 letter as its complaint, but also noted that we lack authority to grant injunctive relief directing Respondent to restore the parking lot. The Board advised that it could consider an appeal related to a monetary claim submitted to the contracting officer. (Order dated August 2, 2011). The record does not reflect that Appellant has submitted a monetary claim related to Respondent's alteration of the parking lot. Directing Respondent to restore the parking lot to its previous condition—the only relief Appellant seeks in this appeal—involves an equitable remedy in the nature of injunctive relief. The Board lacks authority to order such relief. See *JM Carranza Trucking Co., PSBCA No.*

6354, 11-1 BCA ¶ 34,643; *Luvn Constr. Corp.*, PSBCA No. 6235, 09-2 BCA ¶ 34,222; *Lee Ann Wyskiver*, PSBCA No. 3621, 95-2 BCA ¶ 27,755. The Board's lack of authority to order Respondent to restore the parking lot was highlighted in the August 2, 2011 Order in which Appellant was advised that it could submit a monetary claim to the contracting officer, which, if denied and appealed, could be considered by the Board. The record does not reflect that Appellant submitted a monetary claim, and, accordingly, this appeal is subject to dismissal. See *Tab Distributors, Inc.*, PSBCA No. 4134, 99-1 BCA ¶ 30,110.

The appeal is dismissed. However, this dismissal is without prejudice to Appellant's submission of a claim within the meaning of the lease's Claims and Disputes clause (AF 1, General Condition A.13) and an appeal of any adverse contracting officer's final decision to the Board in which appeal Appellant seeks monetary or other relief within the authority of the Board to grant.

Norman D. Menegat
Administrative Judge
Board Member

[1]

This letter was not identified as a final decision under the Contract Disputes Act and did not advise Appellant of its appeal rights.

November 22, 2011

Appeal of

WINONA RESTORATION PARTNERS LLC
d/b/a THE VILLAGE AT WINONA

LEASE AGREEMENT

PSBCA No. 6398

APPEARANCE FOR APPELLANT:
Brent L. Wilcoxson

APPEARANCE FOR RESPONDENT:
Jacqui De Laet Skoglund, Esq.

OPINION OF THE BOARD

Appellant, Winona Restoration Partners LLC, leased a post office to Respondent, United States Postal Service. The drinking fountain in the facility failed, and after Appellant denied responsibility for its repair, Respondent replaced it. The contracting officer issued a final decision notifying Appellant that the cost of the replacement would be deducted from Appellant's rent, and Appellant appealed.

At the joint request of the parties, the appeal is being decided on the record without an oral hearing in accordance with 39 C.F.R. §955.12. Appellant elected application of the Board's Small Claims (Expedited) procedures, 39 C.F.R. §955.13. Both entitlement and quantum will be addressed.

FINDINGS OF FACT

1. The Winona Lake, Indiana Main Post Office was constructed in 1957, and Respondent has occupied it as tenant continuously since December 1, 1957 (Joint Stipulation of Non-Contested Facts, paragraphs ("Stip.") 3, 4).

2. Appellant became the owner of the property and Respondent's lessor on or about October 7, 1996 (Stip. 5).

3. On September 22, 1999, the parties entered into a lease for the premises for ten years, beginning December 1, 1999. The lease contained an option available to Respondent for an additional five years, which Respondent has exercised, continuing the lease through November 30, 2014. (Stip. 1, 2; Appeal File, tabs ("AF") 1, 2).

4. The lease requires Appellant to furnish, among other features, a water system, and refers to General Condition A.24 for definitions (AF 1 (p. 2), Lease Clause 5). General Condition A.24, Lessor Obligations, provides,

The Lessor's obligations regarding the services to be provided are further defined as

i. If water system is furnished – Lessor must furnish a water system in good working order with separate water meter.

(AF 1 (p. 12), General Condition A.24 i; Stip. 8).

5. The lease contains a "Maintenance Rider, Lessor Responsibility" clause which

provides, in relevant part,

The lessor shall . . . maintain the demised premises, including the building and any and all equipment, fixtures, and appurtenances, whether severable or non-severable, furnished by the Lessor under this Lease, in good repair and tenable condition.

(AF 1 (p. 18); Stip. 6, 7).

6. The Maintenance Rider requires Respondent to notify Appellant of the need for

maintenance or repair that is Appellant's responsibility under the lease. If Appellant fails to

perform its required maintenance or repair, the lease grants Respondent "the right to perform the work by contract or otherwise and withhold the cost thereof (which may include

administrative cost and/or interest) from payments due or to become due under" the lease.

(AF 1 (p. 18)).

7. On or about June 10, 2010, the only water fountain in the post office failed. The

fountain no longer provided cooled water or an adequate flow of water, and it leaked.

Respondent's employees turned off the water supply to the fountain. (AF 3, 4, 9).

8. The water fountain was refrigerated, plumbed into the building's water system (water line and drain line), and connected to the building's electrical system (Declaration of J. Deturk

("Deturk Decl.") ¶15; Declaration of B. Wilcoxson). It was installed prior to the parties' execution of the lease (Stip. 13), and had been in place and operational since at least 1966 (Deturk Decl. ¶¶5, 6).

9. By letter of August 3, 2010, Respondent notified Appellant of the need for repair of the water fountain. The letter stated Respondent's view that the lease required Appellant to repair the water fountain and set a deadline of August 31, 2010, for completion of the repairs. The letter further advised that if Appellant failed to make the repairs, the lease authorized Respondent to do so and recover the costs of the repairs plus administrative costs and interest from rent. (AF 4).

10. Appellant responded, through counsel, denying responsibility for repair of the water fountain (AF 5).

11. In an August 30, 2010 letter, Respondent repeated its interpretation of the lease as requiring Appellant to repair the water fountain (AF 6) and on September 14, 2010, notified Appellant that Respondent intended to perform the work necessary to repair the water fountain and that the costs of the work plus administrative costs and interest would be recovered from Appellant's rent. (AF 6, 7).

12. Respondent engaged a plumbing contractor who inspected the water fountain, noted that the compressor no longer worked, and recommended that the water fountain be replaced. The contractor installed a new replacement refrigerated water fountain and connected it to the existing plumbing and electrical systems. (AF 8, 9).

13. The plumbing contractor's bill reflected a price for materials of \$1,034.25 (new water fountain (\$1,015.80) and piping and fittings); \$393.75 for 5.25 labor hours; and \$65 for a trip charge (Standard Commercial Service Charge). Respondent paid the total bill of \$1,493. (AF 8, 9, 10; Stip. 11).

14. On November 5, 2010, the contracting officer demanded that Appellant pay \$1,508.98 for replacement of the water fountain. To the plumbing contractor's price of \$1,493, the contracting officer added administrative costs of \$15.98 reflecting one-half hour spent by the postal employee arranging for the work to be done by the plumbing contractor (AF 11, 12;

Stip. 14).

15. By final decision of December 6, 2010, the contracting officer stated Respondent's intention to withhold \$1,512.91 from Appellant's rent. That amount included an interest charge of \$3.93. (AF 13; Stip. 15, 16).

16. On December 11, 2010, Appellant appealed the final decision to the contracting officer, requesting that the Board's Small Claims (Expedited) procedure apply (AF 14). The contracting officer sent the appeal to the Board on July 22, 2011, at which time it was docketed.

DECISION

Appellant argues that it should be granted judgment in its favor because Respondent failed to send Appellant's Notice of Appeal to the Board promptly. As a result, Appellant's request for an expedited resolution of the appeal was thwarted. The Rules of Practice applicable to Board proceedings provide,

Upon receipt of a notice of appeal in any form, the contracting officer shall indicate thereon the date of mailing (or date of receipt, if otherwise conveyed) and within 10 days shall forward said notice of appeal to the Board, and shall include a copy of the contracting officer's final decision if one has been issued.

39 C.F.R. §955.4. In this case, the contracting officer, through counsel, sent Appellant's appeal to the Board about seven months after he received it. Respondent has not offered any explanation for the contracting officer's lack of diligence.

We do not condone Respondent's failure to comply with applicable regulations and by doing so denying Appellant's opportunity authorized under the Contract Disputes Act to obtain a speedy decision on its appeal. However, under the circumstances of this appeal, we discern no prejudice to presentation of Appellant's case once the matter was brought before the Board. Accordingly, we do not find that Respondent's conduct, though improper and unexplained, warrants granting the appeal.

Respondent argues that the water fountain was part of the demised premises, was furnished by the lessor, and, therefore, was within Appellant's duty under the lease to maintain the premises in good repair and tenantable condition. Appellant argues that since General

Condition A.24 only specifies that the lessor must furnish a water system in good working order with a separate water meter and does not mention any equipment or fixtures, the lessor was not obligated under the lease to provide a water fountain. Appellant continues that as it was not required to "furnish" the water fountain under the lease, it had no duty to repair or replace it once it failed.

Appellant's interpretation is unreasonable and is rejected. "Further defining" in clause A.24 of the lease the lessor's obligation to provide a water system by requiring that the water system be in good working order and have a separate meter (Finding 4) does not describe or limit the features that such a water system must have. The lease's identification of items within the scope of Appellant's repair responsibility under the Maintenance Rider as "equipment, fixtures, and appurtenances" is broad enough to include the water fountain at issue.

Appellant argues that the water fountain was not furnished by the lessor under the lease. If it were, however, Appellant is responsible for its repair. *See Brush Creek Partners*, PSBCA No. 5372, 08-2 BCA ¶ 33,957. In that case, evidence before the Board included plans related to the original construction of the building that indicated the lessor/builder was to install the water fountain. Here, Respondent has not presented drawings relating to the original construction of the Winona Lake Post Office in 1957. However, Respondent demonstrated that the water fountain had long been in the office, was the only drinking fountain in the office, and was connected to the plumbing and electrical systems. Moreover, it was in place when Appellant and Respondent entered into the September 22, 1999 lease for the premises. (Findings 7, 8).

These circumstances are sufficient to establish prima facie that the water fountain was provided by a lessor. Appellant has not disproved this fact. Appellant offered the statement of one of its employees familiar with construction in the area who states that the company that he believes built the Winona Lake Post Office was notoriously penurious and never would have willingly provided a drinking fountain. This assumes that the builder of the post office was free to dictate the features to be included in the building as opposed to complying with specifications established by the Post Office Department. We give this speculation no weight.

Appellant points out that the water fountain was not working for a period of time before it was replaced and Respondent's employees suffered no apparent ill effects from the lack of the water fountain, and that water was available from faucets elsewhere in the post office. While true, these facts have no bearing on Appellant's responsibility under the Maintenance Rider to maintain and repair/replace as necessary the lessor-furnished water fountain that was present and functioning at the time the lease was executed. While alternative water supplies were available, Respondent is entitled under the lease to a drinking water supply that is the functional equivalent of that present in the post office at the time the lease commenced.

Therefore, we conclude that it was Appellant's responsibility under the Maintenance Rider to furnish Respondent a functioning water fountain. When it failed to do so, Respondent was entitled to repair or, if needed, replace the water fountain and to charge against rent the reasonable costs incurred. See *Nationwide Postal Management*, PSBCA No. 3938, 99-1 BCA ¶ 30,126.

Respondent demonstrated it incurred costs of \$1,493 for replacement of the fountain. Appellant does not challenge the reasonableness of that charge for removal of the old and installation of a new, replacement, refrigerated water fountain except to note that the work was done by an out-of-town contractor. However, the contractor's bill does not include a mileage or travel charge, and Appellant has not questioned the bill itself. We conclude that the costs were reasonable. See *Abcon Associates, Inc.*, PSBCA No. 5291, 09-1 BCA ¶ 34,100; *Jerald Michael*, PSBCA No. 4779, 04-1 BCA ¶ 32,497 at 160,766.

Appellant contends, however, that drinking water could have been provided at a lower cost by installing a chilled water dispenser utilizing refillable bottles that Respondent's employees could refill in the post office sinks. This is not equivalent to the water fountain installed and would require significantly more effort and cost to Respondent to provide drinking water. The lower cost of providing such a water dispenser is not relevant to the reasonableness of the costs Respondent incurred to install the replacement water fountain. Additionally, the cost of one-half hour of Respondent's official's time in arranging for replacement of the water fountain was reasonable and is therefore

recoverable under the terms of the lease. Respondent has not demonstrated the basis for its interest calculation, and that part of its claim is not recoverable. Accordingly, Respondent is entitled to recover \$1,508.98 from Appellant.

Except that Respondent may not recover interest on its claim, the appeal is denied.

Norman D. Menegat
Administrative Judge
Board Member

December 14, 2011

Appeal of

SAZIE WILSON

d/b/a

GIL TRUCKING

Under Contract No. HCR 10531

PSBCA No. 5247

APPEARANCE FOR APPELLANT:

James D. Hartt, Esq.

APPEARANCE FOR RESPONDENT:

Eugenia Izmaylova, Esq.

Office of the General Counsel

United States Postal Service

[1]

OPINION OF THE BOARD

Appellant, Sazie Wilson, doing business as Gil Trucking, has filed an appeal from a contracting officer's decision terminating for default his mail transportation contract with Respondent, United States Postal Service. At the election of the parties, the appeal is being decided on the record, 39 C.F.R. §955.12, without an oral hearing.

FINDINGS OF FACT

1. Contract HCR 10531 was renewed in July 2001 for the period beginning July 1, 2001, and ending June 30, 2005. The contract rate at the time of award was \$176,888.60 per annum. The contract required Appellant to transport mail, in both directions, between the Westchester, New York Processing and Distribution Center (P&DC) and various destinations within 18 miles of the P&DC. Appellant was generally required to operate between seven and nine round trips on Mondays through Saturdays, and two trips on Sundays. A manager at the P&DC was identified in the contract as the Administrative Official (AO), charged by the contracting officer with administering and supervising the contract. (Appeal File Tab (AF) 1, pp. 1, 6-8, 33).

[3]

2. The contract required Appellant to "carry all mail tendered for transportation under this contract ... with certainty, celerity, and security, in accordance with the operating schedule." In addition, Appellant was required to "have readily available sufficient stand-by equipment ... to prevent delays in emergencies such as mechanical failures" (AF 1, clauses B.2.a and B.3.a (pp. 11, 13)).

3. The contract's "Termination for Default" clause (clause B-13; January 1997

(modified)) provided, in part, that,

a. (1) The Postal Service may, ... by written notice of default to the supplier, terminate this contract in whole or in part if the supplier fails to:

(a) Complete the requirements of this contract within the time specified in the contract or any extension;

(b) Make progress, so as to endanger performance of this contract ...; or

(c) Perform any of the other provisions of this contract (but see subparagraph a.(2) following).

(2) The Postal Service's right to terminate this contract under a.(1)(b) and (c) above may be exercised if the supplier does not cure the failure within three days ... after receipt of the notice from the contracting officer specifying the failure ...

* * *

g. If, after termination, it is determined that the supplier was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for convenience.

(AF 1, clause H.4 (p. 34.5)).

4. By letter dated December 5, 2002, citing four instances of late service and six instances of omitted service in the previous three weeks, the Transportation Networks manager at the P&DC advised Appellant that she considered contract service to be unsatisfactory. The manager warned Appellant that if service did not improve, she would recommend either substantial fines or that the contract be terminated. (AF 7).

5. In an April 5, 2004 letter, citing 11 instances of omitted service and nine instances of late service since the previous October, the manager again complained to Appellant about unsatisfactory service. She warned Appellant that if satisfactory service was not immediately reestablished, she would recommend that the contract be terminated. (AF 9, 10).

6. Between August 10 and October 29, 2004, Appellant ran at least 22 trips late and failed to run at least seven trips (AF 20, pp. 143-172).

7. By letter dated November 2, 2004, the manager, citing a list of irregularities she stated had occurred since the April 5, 2004 letter was issued, stated that she considered Appellant's performance unsatisfactory, due to "frequent breakdowns, drivers not maintaining schedule and omitted service." The manager indicated that she was considering recommending termination, but stated that before she did so she requested that Appellant
[4]
attend a formal conference on November 15, 2004. (AF 12).

8. Between November 5 and December 6, 2004, Appellant ran at least five trips late and failed to run at least two trips (AF 20, pp. 174-181).

9. By letter dated November 30, 2004, the manager again requested that Appellant attend a formal conference, this time on December 8, 2004. She warned that Appellant's "failure to comply with this meeting will result in immediate suspension of your Highway Contract Route." The parties met on December 8, 2004, at which meeting the manager informed Appellant that she expected service to be "totally satisfactory" for the remaining term of the contract. (AF 13, 15).

10. On December 9, 2004, Appellant operated one trip 35 minutes late. On December 11, Appellant failed to operate at least three of his trips, and on December 13, he failed to operate one trip. (AF 20, pp. 182-186).

11. In an email message dated Monday, December 13, 2004, the contracting officer indicated that he had been contacted by a senior plant manager at the Westchester P&DC complaining of Appellant's missed trips and of the "extraordinary lengths" the manager had to go through to cover the service. After evaluating the irregularity reports and the efforts by the AO, through letters and meetings, to improve Appellant's service, the contracting officer directed a subordinate to draft a default termination letter, with termination to occur by the middle of the week. (AF 16; Declaration of H. Martinez, dated November 13, 2009).

12. In a final decision dated December 16, 2004, the contracting officer terminated Appellant's contract for default, effective as of the close of business on December 17, 2004, "for failure to perform service according to the terms of the contract." Simultaneously with the termination, the contracting officer issued a Contract Route Service Order suspending Appellant's pay until further notice. (AF 18, 19). Appellant filed a timely appeal of the termination.

DECISION

Respondent, which has the burden of proof in this termination for default appeal, see *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *Charli Selsa Schriver d/b/a NGX-Schriver*, PSBCA No. 4545, 02-2 BCA ¶ 31,937; *Douglas Cremer*, PSBCA No. 3108, 93-2 BCA ¶ 25,565, argues primarily that termination was justified by Appellant's delivery delays and failures, and argues that the contracting officer's decision to terminate was within his discretion.

Appellant challenges the default termination on a number of grounds. First, Appellant takes the position that the termination was improper, and should be converted to a termination for convenience, because the contracting officer failed to give Appellant a three-day notice and opportunity to cure before terminating for default. Appellant argues that a three-day notice was mandated by paragraph a.(2) of the Termination for Default Clause (Finding 3), and was a prerequisite to the exercise of the contracting officer's right to terminate. Moreover, Appellant argues, in failing to give him the opportunity to cure before terminating the contract, the contracting officer acted arbitrarily and capriciously.

Second, Appellant argues that his ability to perform the contract adequately was adversely affected because he was denied raises “consistent with other suppliers and [his] financial situation.” Appellant cites as support for this argument that many of the irregularity reports from his route reflected mechanical breakdowns as the reason for service delays and omissions, and asserts that the “routine” mechanical breakdowns were caused by a shortage of funds available for maintenance of his trucks.

Finally, as relief for the allegedly improper termination, Appellant demands payment in the amount of \$105,379.41, which he alleges is the unpaid contract amount through the end of the contract term (June 2005), plus an unspecified amount representing the “full value of raises appellant was entitled to but did not receive.” In addition, Appellant seeks the relief set out in paragraph g of the Termination for Default clause – which provides for the conversion of an invalid termination for default to a termination for convenience (Finding 3).

Respondent replies that the contract did not require it to give the three-day cure notice that Appellant has argued was mandated. In the alternative, Respondent contends that the conferences held by, and letters sent by, the Administrative Official (Findings 4, 5, 7, 9) provided any necessary notice.

With regard to Appellant's argument alleging arbitrary, capricious, and bad faith actions by the contracting officer, Respondent argues that there was a rational, operations-based reason for the contracting officer's exercise of his discretion to terminate. Respondent also argues that there is no evidence of any specific intent to harm Appellant, which, Respondent contends, is a prerequisite to a finding of bad faith.

Addressing Appellant's contention with respect to the three-day cure notice first, we agree with Respondent that such a notice was not required under the language of the contract. As we have previously held, failures to perform required trips – or delays in their performance – were failures to complete the contract requirements within the time specified and, therefore, fell within paragraph a.(1)(a) of the Termination for Default clause (Finding 3). *Kemcorp*, PSBCA No. 4454, 00-2 BCA ¶ 31,146 at 153,829. Thus, the cure notice specified under paragraph a.

[5]
(2) was not a prerequisite to a termination on that basis. and we do not accept Appellant's

[6]

contention to the contrary.

As noted above, Respondent has the burden of proving the propriety of the default

termination. In this instance, we consider Appellant's failure to operate at least three trips on December 11 and one trip on December 13, when combined with Appellant's earlier

performance failures and the warnings from the AOC, to constitute a substantial failure of

performance and to justify the termination, unless Appellant can demonstrate either that these performance failures were excusable or that the contracting officer's decision to terminate the contract constituted an abuse of discretion. See, e.g., *Lissa Aichele*, PSBCA No. 5354, 09-2 BCA ¶ 34,259; *Janet L. Fox and Todd Fox*, PSBCA Nos. 6159, 6169, 09-1 BCA ¶ 34,082 at 168,507, and cases cited therein.

Appellant does not deny that these failures occurred, and his only argument for

excusability appears to be his contention that he was unable to maintain his trucks properly because he was denied certain, undefined "raises" consistent with other suppliers. While

Appellant made this argument in his brief, there is no record evidence directly supporting his

contention. We note that there is no indication in the reports for the deficiencies that directly led to his termination that the missed trips were caused by mechanical breakdowns (Finding 10).

Rather there are simply notations that Appellant failed to report to run those trips. In addition,

Appellant has failed to offer evidence showing that Respondent's failure to pay appropriate

"raises", if it occurred at all, was the primary or controlling cause of Appellant's failure to perform satisfactorily. See, e.g., *E&J Trucking*, PSBCA Nos. 5092, 5188, 09-1 BCA ¶ 34,073 at

168,475; *Todd's Letter Carriers*, PSBCA Nos. 4904-4920, 5002, 5003, 05-2 BCA ¶ 33,121 at

164,136, and cases cited therein. Accordingly, Appellant has not shown the failures that led to

this termination to be excusable.

We turn next to Appellant's contention that the contracting officer abused his discretion

when terminating the contract for default. In order to find an abuse of discretion, a decision

must be found to be arbitrary and capricious. *United States Fidelity & Guarantee Co. v. United*

States, 676 F.2d 622, 630 (Ct. Cl. 1982). The Court of Claims also set out four separate factors which should be used in determining if conduct by a government official is arbitrary and

capricious. These are: (1) evidence of subjective bad faith on the part of the official; (2) if there is "no reasonable basis" for the decision; (3) the amount of discretion given to the official, *i.e.*, the greater the discretion granted, the more difficult it will be to prove the decision was arbitrary and capricious; and, (4) whether there has been a proven violation of an applicable statute or regulation. *United States Fidelity & Guarantee*, 675 F.2d at 630, citing *Keco Industries, Inc. v. United States*, 492 F.2d 1200 (Ct. Cl. 1974).

To prove bad faith, Appellant must demonstrate, by the equivalent of clear and convincing evidence, a specific intent to harm Appellant. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002); *see, e.g., Gary W. Noble*, PSBCA No. 4094, 00-1 BCA ¶ 30,602 (on reconsideration). Appellant's argument is somewhat unclear, but he appears to be contending that the contracting officer had prejudged the situation and had already decided to terminate the contract at the time he gave his subordinate the direction to prepare a termination letter (Finding 11), without first allowing Appellant the opportunity to "cure" the default.

From the record, it appears that the contracting officer had, in fact, decided to terminate the contract at the time he directed the preparation of the termination letter. However, by that time he had reviewed and evaluated the irregularity reports and considered the AO's efforts to improve Appellant's service, and there is no indication in the record that his decision was other than one based on that evaluation. We do not see in this record a demonstration that the contracting officer's motivation was to harm Appellant. Moreover, as noted above, there was no contractual requirement to provide Appellant a notice and the opportunity to cure the deficiencies. Accordingly, Appellant has not demonstrated subjective bad faith by the contracting officer.

Appellant does not address the second element – *i.e.*, whether the contracting officer's action had a reasonable basis. As indicated above, however, there is no record evidence suggesting that the basis for the contracting officer's termination action was other than the improvement of service – clearly a reasonable basis for the action. Accordingly, this element militates in favor of Respondent.

With regard to the third element, Appellant argues only that the contracting officer's discretion was limited by the requirement to provide a cure notice before terminating for default. The Termination for Default clause affords the contracting officer broad discretion, particularly with respect to failures to complete contract requirements on time. As we have concluded that a cure notice was not required under these facts, we do not agree with Appellant's argument that the contracting officer's discretion was limited by that requirement. Accordingly, the third element also militates in favor of Respondent.

With regard to the fourth element, violation of a statute or regulation, Appellant again refers only to the failure to provide a cure notice, an alleged violation of a contract provision. Inasmuch as such a failure, even if proved, would not constitute a violation of a statute or regulation, this element provides no support for Appellant's position.

Accordingly, we conclude that Appellant has not demonstrated that the contracting officer's decision to terminate the contract for default represented an abuse of his discretion. Respondent has demonstrated that Appellant's performance failures represented a substantial failure of performance, and Appellant has failed to demonstrate either that his performance failures were excusable or that the contracting officer's decision to terminate the contract constituted an abuse of discretion. Accordingly, Appellant's appeal of the termination [7] is denied.

With regard to Appellant's demands for relief, inasmuch as we have found the

termination to be proper, Appellant's demand that the termination be converted to one for convenience is denied. The Board lacks jurisdiction to consider Appellant's monetary demands inasmuch as there is no evidence they were first submitted to the contracting officer, which is a prerequisite to our jurisdiction. *Paragon Energy Corp. v. United States*, 645 F.2d 966 (Ct. Cl. 1981); 41 U.S.C. §§7103, 7104. The appeal is denied.

David I. Brochstein
Administrative Judge
Vice Chairman

I concur:
William A. Campbell

Administrative Judge
Chairman

I concur:
Norman D. Menegat
Administrative Judge
Board Member

-
- [1] Administrative Judge Gary E. Shapiro took no part in the Board's consideration of this matter.
- [2] With some variations on holidays.
- [3] Appeal File Tab 1 contains the contract. The version of the contract filed with the original Appeal File was incomplete, and the parties later submitted a replacement copy. References in this Opinion to contract provisions are to provisions and page numbers in the latter version.
- [4] The record contains no direct evidence regarding whether Appellant attended the conference, but the wording of the AO's November 30, 2004 letter (Finding 9, below) suggests that he did not.
- [5] Consistent with this reading of the contract language, we note that it is physically impossible to "cure" the failure to timely perform a trip once the time has passed – no matter how long a cure period is allowed.
- [6] As a result, we need not and do not address Respondent's alternate argument – *i.e.*, that the conferences with, and letters from, the Administrative Official would have provided the requisite cure notice, had one been required by the contract.
- [7] The record contains a copy of a contracting officer's decision assessing \$24,251.70 in reprourement damages against Appellant but no record of an appeal of that decision (see Respondent's submittal dated May 20, 2005). While we would have jurisdiction to consider the reprourement assessment even in the absence of a timely appeal, *e.g.*, *Hubbard Trucking, Inc.*, PSBCA No. 3701, 04-2 BCA ¶ 32,667 (1996), neither party introduced any evidence with respect to that assessment or otherwise sought to litigate any related issues. Accordingly, we do not address the reprourement assessment in this Opinion.

December 14, 2011

Appeal of

HAROLD N. COLERICK

Under Contract No. HCR 693AD

PSBCA No. 6356

APPEARANCE FOR APPELLANT:
Harold N. Colerick

APPEARANCE FOR RESPONDENT:
Melissa M. Mortimer, Esq.
Office of the General Counsel
United States Postal Service

OPINION OF THE BOARD

Respondent, United States Postal Service, terminated the mail transportation contract of Appellant, Harold N. Colerick, by exercising a termination with notice provision. Appellant claimed costs related to the termination and appeals the contracting officer's rejection of those costs. We deny the appeal.

FINDINGS OF FACT

1. Appellant entered into Transportation Services Renewal Contract No. HCR 693AD with Respondent, requiring Appellant to provide mail transportation services between Alliance, Nebraska and the Alliance Airport from July 1, 2009, through June 30, 2013 (AF 1; [1] Stip. 2).
2. The contract paid \$26.52 per round trip, without an overall annual rate. The number of trips was estimated as twice daily with some exceptions, and subject to "change due to the needs of the Postal Service and because of the air carrier schedule changes." (AF 1 at p. 9; Stips. 3-4).
3. Trips for transportation of mail outside Alliance also were ordered by Respondent when planes servicing the Alliance airport were unable to land there. Respondent

paid Appellant for this additional service as extra trips at a negotiated rate. (AF 1; Stip. 4-5; Manchego Decl. ¶ 11, Ex. B; Moran Decl. ¶ 3).

4. The contract included Issue 8 of Respondent's standard set of Terms and

Conditions (AF 1 at p. 3; Manchego Decl. ¶ 4). Section 2.3.3 of those Terms and Conditions,

Termination of Contracts, provided:

The clauses below captioned "Termination with Notice" and "Termination for the Postal Service's Convenience" are in the alternative, so that only one of them is applicable to this contract, and not the other. The designation of which of the two clauses applies will be established prior to renewal or award.

(AF 1 at p. 41). Section 2.3.3a, *Termination with Notice*, provided:

The contracting officer or the supplier, on 60 days written notice, may terminate this contract or the right to perform under it, in whole or in part, without cost to either party.

(AF 1 at p. 41). Section 2.3.3b, *Termination for the Postal Service's Convenience*, appeared

thereafter.

5. The first page of the contract was signed by both parties (AF 1 at p. 3). The

following pertinent language appeared on that page, in a section captioned *Comments*:

Section 2.3.3a of the Terms and Conditions, *Termination with Notice*, is incorporated into this contract; however, it is modified to replace "on 60 days written notice" with "on 90 days written notice." Section 2.3.3b, *Termination for the Postal Service's Convenience*, does not apply. . . . Section 2.3.2b, *Extra Trips*, will be operated at 80% of the prevailing rate per mile at the time service is performed.

(*id.*). Accordingly, and as expressly stipulated by the parties, the contract included the

Termination with Notice clause (hereafter "notice termination") and did not include the

Termination for the Postal Service's Convenience clause (hereafter "convenience

termination."). (Stip. 9; Manchego Decl. ¶ 5, Ex. A).

6. Respondent changed its mail processing network eliminating the need for this

contract because air mail no longer would be sent to the Alliance airport (Manchego Decl. ¶

6). Accordingly, on April 2, 2010, Respondent informed Appellant that it was exercising the

termination on notice clause and suspending service as of April 5 (Stip. 10; AF 2; Manchego

Decl. ¶ 7; Colerick Aff. p. 1).

7. Before being notified of the termination, Appellant had purchased a more

dependable truck to use for the contract. If Appellant had been informed that the operational changes referenced in Finding 6 were going to be made, he would not have purchased this truck. Following the termination referenced in Finding 6, Appellant no longer needed the truck and he has been unable to sell it. (Colerick Aff. p. 1; AF 8). Respondent did not instruct Appellant to purchase the truck (Stip. 8).

8. On April 22, 2010, Respondent's contracting officer transmitted a letter to Appellant with the subject line "Termination for Convenience – HCR 693AD" reiterating within the body of the letter that the contract had been terminated under the notice termination clause. The letter asked Appellant to sign an enclosed PS Form 7406, *Amendment to Transportation Services Contract*, and to return it immediately. (AF 3 at p. 125).

9. Appellant complied with that request, and the same day signed the contract amendment that Respondent had prepared. [2] The section of the amendment captioned *Description of Amendment*, provided in its entirety:

TERMINATION FOR CONVENIENCE

Effective close of business 04/05/2010, this contract its (sic) terminated pursuant to the Termination for Convenience clause.

Supplier agrees to waive the 90-day written notice for a one time payment of \$2,408.82, representing **80%** of the monthly rate for three (3) months.

Computation: \$1,235.29 (monthly rate) X 3 (months) X **65%** = \$2,408.82

(AF 3 at p. 130 (emphases added)).

10. Appellant's contracting officer signed the amendment in May (the precise date is illegible), and Respondent paid Appellant \$2,408.82 based on the amendment (AF 3 at p. 130; Stip. 11; Manchego Decl. ¶ 8).

11. On April 27, 2010, the contracting officer signed PS Form 7440, *Contract Route Service Order*, which provided:

TERMINATION FOR CONVENIENCE – REGULAR TRANSPORTATION SERVICE

Effective close of business 04/05/2010, this contract is terminated pursuant to the Termination for Convenience clause.

(AF 3 at p. 128).

12. On June 15, 2010, Appellant sent a letter to the contracting officer acknowledging that he had "received the pay to cover the 90 day termination," but requesting additional payment for his purchase of a truck used for the contract and for other termination costs (AF 4).
13. On August 3, 2010, Appellant submitted a \$17,090.21 contract termination claim for his costs to purchase the truck used to perform the contract and for related insurance and taxes (Stip. 12; AF 6).
14. On September 2, 2010, Respondent's contracting officer denied the claim and Appellant timely appealed (Stips. 13-14; AF 8-9). Appellant's notice of appeal acknowledged that the contract can be terminated without cost to either party, but he complained that the termination was costing him money and therefore, was not without cost (AF 8).
15. The appeal was submitted on the written record in lieu of an oral hearing. Both entitlement and quantum are at issue. (March 31, 2011 Order).

DECISION

This case suffers from considerable confusion by both parties. Appellant acknowledges that the contract was terminated based on the notice termination clause which allows termination at no cost. Appellant believes, though, that because the termination was not without cost to him, he is entitled to further payment, under convenience termination principles. For its part, prior to this litigation, Respondent repeatedly confused notice termination with convenience termination both in its internal documentation and in its correspondence with Appellant.

If the contract were terminated properly under a notice termination clause, Appellant would be entitled to no compensation from Respondent other than payment for 90 days' required service before the termination became effective. This is the subject of the contract amendment (Findings 9-10) discussed below. If however, Respondent terminated the contract based on a convenience termination clause, additional compensation such as the truck costs here at issue, if properly proved, could be payable. See *Elton T. Colvin, Jr.*, PSBCA Nos. 6220, 6241, 09-2 BCA ¶ 34,310.

The contract documents are clear and Appellant has stipulated that a notice termination clause was available to Respondent and not a convenience termination clause (Findings 4-5). Therefore, once properly invoked, Respondent was permitted to terminate the contract without paying anything further to Appellant. Appellant's interpretation of the notice termination clause – that "without cost to either party" means that he should be made whole because there was a cost to him – is contrary to the plain and clear wording of the clause.

It appears that a considerable amount of Appellant's confusion as to whether he was entitled to convenience termination costs was caused by

Respondent, which used the terminology of notice termination and convenience termination carelessly and interchangeably. In this regard, while Respondent initially informed Appellant that the notice termination clause was invoked (Finding 6), its next letter to Appellant referenced both a notice termination and convenience termination clause (Finding 8). Furthermore, the contract amendment prepared by Respondent twice stated that the contract was terminated for convenience without mention of notice termination (Finding 9), as did Respondent's internal order terminating the contract (Finding 11). Even the contracting officer's referral of this appeal to the Board stated affirmatively that Respondent had terminated the contract for convenience (AF 9). It is little wonder that Appellant was confused about the nature of the termination.

However, the initial termination notification letter identified the notice termination clause, and notice termination was the only available termination provision in the contract. Moreover, the parties stipulated that the notice exercised the notice termination clause (Finding 6). Therefore, Respondent's sloppy use of critical terminology does not affect the outcome of this [3] case.

Termination under the notice termination clause was not effective until expiration of 90 days' notice (Findings 4-5). Because 90 days' notice was not provided (Finding 6), the parties amended the contract to provide a payment to Appellant in exchange for his waiver of the required period of notice (Findings 8-10). However, neither party addresses an issue that is obvious from review of the record – an inconsistency within that contract amendment.

While the contract amendment was intended to resolve liability for Respondent's failure to have provided the required notice, *see Joe Garrett, Inc., PSBCA Nos. 3476, 3667, 95-1 BCA ¶ 27,357*, it includes an obvious internal inconsistency, and potential mutual mistake. The amendment recites that it is based on a payment of 80% of three month's contract proceeds (which calculates to \$2,964.69) but actually computes the payment based on 65% of three month's contract proceeds (\$2,408.82) (Finding 9). The 65% calculation was paid (Finding 10).

Although Appellant's affidavit is unclear concerning whether he means to pursue this issue, neither the \$555.87 difference between the calculations nor any costs or damages related to the amount of notice given or to the contract amendment^[s1] was included in Appellant's claims submitted to the contracting officer or addressed in the contracting officer's decision. Accordingly, we lack jurisdiction presently to reach any conclusion about the issue or provide any relief based on it. See e.g., *J. Leonard Spodek*, PSBCA No. 6146, 10-2 BCA ¶ 34,547.^[4]

CONCLUSION

Respondent terminated the contract based on the notice termination clause.

Accordingly, convenience termination costs such as those sought by

Appellant are not recoverable. The appeal is denied.

Gary E. Shapiro
Administrative Judge
Board Member

I concur:
William A. Campbell
Administrative Judge
Chairman
David I. Brochstein
Administrative Judge
Vice Chairman

[1] References to evidence will use the following conventions:

The appeal file will be referred to as AF, followed by the tab number; the stipulations of fact signed by the parties on July 18, 2011 will be referred to as Stips.; the July 27, 2011 declaration of Mr. B. Manchego will be referred to as Manchego Decl.; the July 27, 2011 declaration of Mr. J. Moran will be referred to as Moran Decl.; and the April 18, 2011 affidavit of Mr. Colerick will be referred to as Colerick Aff.

[2] The record is silent concerning negotiation of that amendment.

[3] Nor has Appellant demonstrated that he relied to his detriment on Respondent's improper use of convenience termination language.

[4] Appellant may submit a monetary claim in this regard to the contracting officer.

[5] The state of the law regarding the remedy for failure to provide sufficient notice in a notice termination is not clear to me. While the approach of A'Prime seems right to me, it also seems to be contradicted by our Board in AJ Custodial Service, 05-2 BCA 33087, where we said the following when faced with a notice termination:

Terminating the contract on 30 days' written notice so that Respondent could obtain the desired service was authorized by the Termination on Notice clause of the contract. . . . Appellant was entitled to compensation for the full notice period, but Respondent compensated Appellant only through . . . the 29th day after the postmaster gave written notice of termination. Appellant is entitled to recover for the 30th day as well.

Since the proper remedy on that issue is not before us, I thought it best not to say either way.